amounts of general obligation bonds, and to spend the public monies for all purposes connected with the preparation of land for residential subdivision sales?

II. Has the State of California denied the Petitioner his right under the 14th Amendment to the United States Constitution to equal protection of the laws where it allows a two year delay in the enforcement of full voting rights of petitioner and 8,000 of his fellow residents and taxpayers, where such delay in enforcement of voting rights is permitted to protect the interests of the land developer who has entirely and now partially controls the local government district by reason of a property qualification for voting?

III. Has the State of California denied the Petitioner his right under the 14th Amendment to the United States Constitution to due process of law where it refuses to compell an accounting from a land developer for the financial benefits that the land developer caused a public entity to bestow upon the land developer when the land developer controlled the public entity under a state law providing for voting by landowners only, one vote per dollar of assessed valuation, and the public entity has general powers of government including the power to lay and collect from the Petitioner real and personal property taxes?

IV. Does the State of California violate the rights of its citizens under the United States Constitution where the State of California, by special acts such as the Estero Act (Cal. Stats. 1961, 1st Ex. Sess. 1960, ch. 82, p. 459), makes general governmental powers, including unlimited borrowing powers and and unlimited powers to lay and collect real and personal property taxes "serviceable to land developers" by the devise of describing the district as being the land owned by the developer and then placing a real property ownership qualification on voting?

## CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES WHICH THE CASE INVOLVES

Constitution of the United States, 14th Amendment, provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Act to Create the Estero Municipal Improvement District, which is commonly known as the Estero Act, and which is cited as California Statutes, 1961, 1st Extra Session 1960, Chapter 82, Page 459, is set forth at the end of this Petition. All questions involved in this Petition for Review concern the Estero Act and the operations of the purported governmental district which that Act was enacted to create.

## STATEMENT OF THE CASE

Petitioner Walter S. Cooper seeks review of what appears to be three cases, but is actually two cases, both of which sought representative government and public financial integrity in the Estero Municipal Improvement District.

The first action was filed in San Mateo County Superior Court as Action Number 126789 on December 3, 1966, in the form of an action at law for a declaration of the legal effect of the Estero Act and legal remedies against the land developer and for the benefit of the Estero Municipal Improvement District and its taxpayers and residents. Demurrer was sustained without leave to amend in favor of all defendants, but judgment was entered at one time for some defendants and at another time for other defendants. This resulted in two notices of appeal and

two titles and numbers in the Supreme Court – that is, Cooper vs. Leslie Salt Company, et al., California Supreme Court Number S. F. No. 22616, and Cooper vs. T. Jack Foster, et al., California Supreme Court No. 22617. Both were disposed of in one Decision in the California Supreme Court, which appears in the Official Advance Sheets as 70 Advance California 669.

The second action was filed in San Mateo County Superior Court as Action Number 127132 on December 20, 1966, in the form of a Petition for a Writ of Mandate seeking a mandate of the Superior Court to direct the Estero Municipal Improvement District to remedy the invasion of Petitioner's constitutional rights and to obtain an accounting from the land developer of the financial benefits it received from the Estero Municipal Improvement District while that District has been under the control of the land developer. The title and number of this proceeding in the Supreme Court of the State of California was Cooper vs. Estero Municipal Improvement District, et al., S. F. No. 22619. The decision of the Supreme Court of the State of California was rendered on the same day as in the other consolidated matter, that is, March 20, 1969, but appears as a separate opinion in the Official Advance Sheets as 70 Advance California 687.

By this Petition for a Writ of Certiorari Petitioner Walter S. Cooper seeks a review of both the California Supreme Court decision at 70 Advance California 669 (Cooper vs. Leslie Salt Company, et al.; and, Cooper vs. Foster, et al.) and also the California Supreme Court decision at 70 Advance California 687 (Cooper vs. Estero Municipal Improvement District, et al.)

## STATEMENT OF THE FACTS

Most of the important facts of this case can be found at various places in the aforesaid California Supreme Court Opinions review of which is sought herein.

All of the matters of which Petitioner seeks review are concerned with the constitutionality, operation, and effect of

the special act of the California Legislature which created the Estero Municipal Improvement District. This act is commonly referred to as the Estero Act and is cited as Stats. 1961, lst Estra Session 1960, Chapter 82, Page 459. (The Estero Act is set forth at the end of this Petition for Certiorari.)

Petitioner will quote from portions of the said Opinions of the Californis Supreme Court in setting forth the facts and will refer to the Official Advance Sheets of the Supreme Court of California ((70 Advance California )) to show the places in the said Opinions where the references are obtained. In quotations from the California Supreme Court Opinions the Estero Act sections are referred to by references to the numbers of the sections of the act as it was enacted, but without the identifying words "Estero Act" adjacent to the section reference. These are the same section numbers which appear in the Estero Act as it is set forth at the end of this Petition for Certiorari.

"The act prescribed the boundaries, organization and powers of the district, as well as the methods for its operation, management, financing, change of boundaries, and dissolution. . . " ((70 Advance California 673)).

"The statute recited that 'The land in the district is not owned by the residents. The owners are the ones primarily concerned with the district and the ones who will be supporting the district. The owners should therefore hold the voting power.' (Sec. 215, Subd. (f).) Thus it was provided that voting was to be upon the basis of assessed valuation of land (Secs. 17, 19, 20, 64), and that the district was to be governed by three directors (Sec. 26) who must be 'owners, or officers or legal representatives of owners' (Sec. 28). The statute places a broad array of municipal functions within the powers of the district, including provision of street lighting, sewerage, storm drainage, garbage service, water service, parks, and playgrounds, and reclamation of land (Sec. 77). The district is also empowered to construct small craft harbors (Sec. 78), provide fire protection (Sec. 79), and 'make and enforce all necessary and proper regulations, not in conflict with the laws of this State, for the ... supplying of . . . police protection service. A violation of a

regulation of the district is a misdemeanor punishable as such.' (Sec. 97) The statute includes elaborate financial provisions, including authorization for the directors to issue general obligation bonds (Secs. 105-123) and other types of securities to raise money for development of raw land included within the district so that the owners thereof, who absolutely control the district, can cause the various improvements to be made which are necessary to make the land fit for marketing as a residential tract." ((70 Advance California 673-674)).

"It appears that at the time the district was created by the Legislature in 1960 it comprised some 418 uninhabited acres under a single ownership, that thereafter it annexed adjacent territory (Sec. 205) so that it now totals some 2,600 acres, and that as improvement and development have proceeded the district has acquired residents." ((70 Advance California 680)). These residents now total more than 8,000 persons. ((70 Advance California 687)).

After describing the power granted to the land owners by the Estero Act to issue general obligation bonds to raise money for improvements to make the land fit for marketing as a residential tract, the Opinion of the Supreme Court of California in Cooper vs. Foster and Cooper vs. Leslie Salt Company directs the reader, at 70 Advance California, page 674, to "Willoughby, *The Quiet Alliance*, (1965) 38 So.Cal.-L.Rev. 72, for a review of several comparable special statutes under which governmental powers have been made serviceable to land developers." At page 73 of 38 So.Cal.L.Rev. that article makes reference to the Estero Act in the following words: "The current trend to subsidize land development with publicly raised funds began in 1960 with the introduction of special legislation to subsidize two specific development projects. Having obtained an option to purchase 2600 acres of San Francisco Bay tidelands, one large developer had a northern California bond counsel draft special legislation to establish the Estero Municipal Improvement District. Supported actively in the Legislature by the same bond counsel, the measure passed without difficulty. The resulting district was contiguous with

the developer's land holdings, was controlled by him and was authorized to issue general obligation, revenue and special assessment bonds at his discretion." This article, at pages 78 and 79 of 38 So. Cal.L.Rev., described the effect of the Estero District and other such land developer controlled districts in California as follows:

"Although the use of special districts to finance development projects is obviously advantageous to potential developers, as a matter of public policy it bristles with danger. In the first place, the use of a public agency to perform an essentially private and propriety service provides no guarantee that any lasting 'public interest' is served thereby. Subsequent land owners have no real voice in such a shadow agency. It will have incurred its major indebtedness and concluded its principal activities prior to their residence in the district. Yet these homeowners, not the original developer, become responsible for repayment of district indebtness. Moreover, if the project does not fully achieve the expectations of the developer, these homeowners will be confronted with soaring debt ratios and excessive tax rates."

". . .

"[those who draft such legislation] are warping and twisting the traditional concept of a special district as a public agency created to effect a public purpose and a public benefit. In its place they are substituting the developer-owned and developer-controlled special district--a public agency created solely for immediate and specific propriety benefit." Such is the opinion of the Estero Act expressed in the only legal authority cited by the California Supreme Court specifically mentioning that act or discussing its legal effect.

The decision of the California Supreme Court at 70 Advance California 669 which is titled Cooper vs. Foster and Cooper vs. Leslie Salt Company both arose out of a single San Mateo County law suit titled Cooper vs. Foster in which the complaint alleged:

"On or about May 11, 1960, at the instance and request of defendants T. JACK FOSTER and T. JACK FOSTER & SONS,

there was enacted by . . . the State of California . . . a certain special law entitled 'An act to create the Estero Municipal Improvement District. . .' Said act purports to create a political subdivision of the State of California, but does not do so because it is in violation of the Constitution of the United States of America and the Constitution of the State of California." (Cooper vs. Foster Clerk's Transcript, Page 4, line 18 through Page 5, line 3).

"Said act is in conflict with the Constitution of the State of California in that, among other things, it violates Article 11, Section 6 of the Constitution of the State of California which states: 'Corporations for municipal purposes shall not be created by special laws.'" (Cooper vs. Foster Clerk's Transcript, Page 5, line 5 through line 10).

"Said act and the purported district are in conflict with the Constitution of the United States of America in that, among other things, the power to vote in said district is divided according to assessed valuation rather than equally among persons." (Cooper vs. Foster Clerk's Transcript, Page 5, lines 18 through 22).

"Said act and the purported district are in conflict with both the Constitution of the State of California and the Constitution of the United States of America in that said act was not enacted pursuant to any authority or plan of law and constitutes an unauthorized special law which has the effect of [an] unauthorized delegation of the legislative powers of the State of California and if enforced would deprive plaintiffs of their property without due process of law, all for the special advantage of private interests of certain of the defendants." (Cooper vs. Foster Clerk's Transcript Page 5, line 24 through Page 6, line 7).

"Said defendant T. JACK FOSTER & SONS have so dominated and controlled said ESTERO MUNICIPAL IMPROVMENT DISTRICT that it has no existence independent of said T. JACK FOSTER & SONS and has been used to promote and finance the real estate development activities of said T. JACK FOSTER & SONS and only incidentally for

public purposes. . . By virtue of said control and domination said T. JACK FOSTER & SONS have obtained great private monetary advantage for themselves . . . which should be restored by them . . . to the . . . DISTRICT. (Cooper vs. Foster Clerk's Transcript Page 8, line 9 through Page 9, line 3)

In the first amendment to the complaint plaintiff added the allegation that "as a result of said domination and control, including control over disbursements of said ESTERO MUNICIPAL IMPROVEMENT DISTRICT by the individual and corporation FOSTER defendants, said defendants are subject to all the duties and obligations of fiduciaries toward said ESTERO MUNICIPAL IMPROVEMENT DISTRICT."

In the second amendment to the complaint plaintiff alleged that $1,667,183.80 of the funds of the Estero District had been paid directly to Midwest Dredging Corporation which was a corporation owned by the Foster defendants and that $860,218.05 of the funds of the Estero District had been disbursed in twenty-two checks to a certain Associated Dredging Company, but these funds had also, by endorsement of the checks, reached said Midwest Dredging Corporation, and that these disbursements had been caused by one W. A. Innes who was a director of the District and an agent and employee of T. Jack Foster & Sons. (Cooper vs. Foster Clerk's Transcript, Page 28, line 5 through Page 29, line 11).

In Cooper vs. Estero, Walter S. Cooper, as Petitioner, sought a Writ of Mandate in regard to the same facts as were alleged in Cooper vs. Foster, however because of a lapse of time it was possible for a more detailed statement of facts on some issues. The most complete statement of petitioner's claims in Cooper vs. Estero is found in the so-called "Cross-Complaint of Defendant in Intervention Walter S. Cooper". (Cooper vs. Estero, Clerk's Transcript, Page 201 through Page 229).

In the Second Cause of Action of that "Cross-complaint of Defendant in Intervention Walter S. Cooper" set forth the property qualification for voting in the District and the fact that the majority of voting power was always held by T. Jack Foster & Sons because of that property qualification. (Cooper

vs. Estero Clerk's Transcript, Page 210 line 21 through line 31). Petitioner then alleged in detail that while T. Jack Foster & Sons controlled the Estero District it caused the District to disburse millions of dollars of public money of the District to T. Jack Foster & Sons. (Cooper vs. Estero, Clerk's Transcript, Pages 211 through 213). Petitioner also alleged in that cause of action that T. Jack Foster & Sons caused the District to improve lands of T. Jack Foster & Sons at great public expense and then caused those lands to be sold to the District or other public bodies without reimbursing the District from the sale proceeds for the cost of improvement, thus leaving the District and the public with no source for the repayment of the debt incurred for the improvement. (Cooper vs. Estero Clerk's Transcript, Page 213 line 10 through Page 214 line 10). Petitioner alleged that he has requested that the Estero District obtain an accounting from T. Jack Foster & Sons but that the District and T. Jack Foster & Sons have refused the request, and that T. Jack Foster & Sons is obliged to make such an accounting because T. Jack Foster & Sons has voluntarily assumed the position of trustee or fiduciary for the District. (Cooper vs. Estero Clerk's Transcript Page 214 line 24 through Page 214, line 2.)

In the Ninth Cause of Action of Cooper vs. Estero petitioner alleges that he and all other Taxpayers of the Estero Municipal Improvement District are being deprived of their Constitutional, property, and personal rights by the Estero Municipal Improvement District in violation of the Constitution of the United States of America, and the Constitution of the State of California, in that, among other things:

(a) the public credit and monies of the Estero District are being loaned to T. Jack Foster & Sons in violation of California Constitution Article 4 Section 31;

(b) the denial of the right to vote to citizens of the Estero District like Walter S. Cooper who do not own real estate in the District is a violation of the Equal Protection Clause of the Constitution of the United States of America and of Article 2, Section 24 of the Constitution of the State of California which

forbids the making of a property qualification as a requirement of voting; [Petitioner Walter S. Cooper lives in the Estero District upon land which he rents and upon which he has placed improvements valued at $42,000, and his real and personal property taxes exceeded $1700 in the year the suit was filed, about a third of which sum was payable to the Estero District, but since he was not a landowner he had no vote at all that year. (Cooper vs. Foster, Reporter's Transcript, Page 104, lines 5-10; Page 144, lines 6-24). Under the amendment to the Estero Act Petitioner Cooper may vote for only two out of the five directors of the District. (Cooper vs. Leslie Salt Company, Supreme Court Opinion, Footnote 3, 70 Advance California at page 674.)]

(c) the entire scheme of the Estero act is in violation of the California Constitution and the Fourteenth Amendment to the Constitution of the United States in that the police powers, public spending and borrowing powers, and taxing powers are exercised by private persons though a disenfranchised public must pay the taxes and the public debt thus incurred. (Cooper vs. Estero Clerk's Transcript, Pages 226 through 227).

As stated in the footnote of the Opinion of the Supreme Court of California in Cooper vs. Leslie Salt Company, 70 Advance California at page 674, since this action was filed the California Legislature amended the Estero Act to increase the number of directors to five and permit two of those five to be popularly elected.

In the actions for which review is sought, Walter S. Cooper prayed for relief which may be summarized as follows: a declaration upon the Constitutionality of the Estero Act; a Court enforced election in the Estero District, on the basis of one man one vote; and an accounting of the financial transactions between the District and T. Jack Foster & Sons, the land developers who controlled the District. The Supreme Court of the State of California denied each of these prayers holding that general demurrers had properly been sustained to the complaint and the petition of Walter S. Cooper in both matters.

## ARGUMENT

While petitioner would be most pleased to have the opportunity to brief the points involved in this matter to whatever extent that the Court might wish, petitioner shall make a somewhat short legal argument because petitioner is convinced that the issues are basic and simple.

### I

### Constitutionality of the Estero Act

In the Opinion of the California Supreme Court in Cooper vs. Leslie Salt Company at 70 Advance California, from the bottom of Page 674 through the bottom of Page 676 the California Supreme Court disposes of petitioner's claims that the Estero Act is Unconstitutional by ruling that only the attorney general can contest the proceedings leading to the formation of a district and that the Estero Act is not patently Unconstitutional. The California Supreme Court also mentions without comment that "A judgment purporting to establish the constitutionality of the act creating the district and the validity of the district's bonds was rendered in a noncontested *in rem* proceeding in the Superior Court of San Mateo County on July 20, 1961." On the foregoing grounds the Supreme Court of the State of California declined to take up the question of Constitutionality. The California Courts have held that quo warranto is not the exclusive remedy for testing the Constitutionality of an Act of the Legislature which establishes a governmental subdivision, but on the contrary, the California Courts have ruled that a private citizen may question the Constitutionality of all or part of such an act. Brandenstein vs. Hoke (1894) 101 Cal. 131 [35 P. 562]; Miller & Lux vs. Board of Supervisors (1922) 189 Cal. 254; and Gilgert vs. Stockton Port District (1936) 7 Cal.2nd 384. The very words of the Court show that its Opinion is incorrect. It is the proceedings to establish a district which are immune from attack by a citizen,

not the Act under which the district is purportedly established. Furthermore the immunity, if any exists, is an immunity from attack upon the existence of the District, and does not give it license to perpetually invade the Constitutional rights of Petitioner and others. "A validating act cannot cure jurisdictional defects, but cures only such defects and irregularities as could have been omitted by the legislature in the first instance." Miller & Lux vs. Board of Supervisors (1922) 189 Cal. 254. The conclusion of the Supreme Court of California that the Estero Act is not Unconstitutional on its face is not supported by any explanation or discussion of the Constitutional issues involved in the Act. Among the many Constitutional questions that are raised by a reading of the act, it clearly appears that the Act purports to create a District with general powers of government while imposing a quantative property qualification on the right to vote. The effect of the ruling of the Court is apparently to make the Estero District, and consequently the land developers who have been controlling it, immune from any assertion of Constitutional rights by Petitioner and other taxpayers.

In determining that the land owner should have such a vested interest in local government the California Supreme Court relies upon findings in the Estero Act by which the Legislature asserted that there were unique conditions at the site of the land developer's property which was to be the area of the Estero District. Such findings are made as a matter of form by the California Legislature when it establishes special districts for land promotion. The wording in each case is identical. (Cooper vs. Foster Clerk's Transcript, page 46).

While voting rights is the obvious and fundamental Constitutional question in this case, it is property rights and not political rights which are the principal concern of the Petitioner and other parties involved with the Estero Municipal Improvement District. Petitioner and others have not complained about the operation of their local police force under the control of the land developer, but they have complained about the incurring of public debt, the spending of public money and the levy of taxes under the control of the land developer.

Similar complaints were made of King John of England 750 years ago, and he then granted the Magna Carta, which is regarded as a foundation of representative government, and sets forth principles of due process of law such as are guaranteed by the 14th Amendment to the Constitution of the United States of America.

In Section 15 of the Magna Carta there is a guarantee that the sovereign will not do the very thing which was done by the California Legislature when it enacted the Estero Act. Section 15 of the Magna Carta provides: "We will not for the future grant to any one that he may take aid of his own free tenants, . . ."

Thus the sovereign has guaranteed that it will not grant to any one the power to collect taxes from other persons, but the Estero Act placed the control of the public borrowing, spending and taxing powers in the hands of the land developer, and the land developer has been exercising that control even to the extent of disbursing the public monies to himself, but the Supreme Court of California will not place the government under control of the citizens nor will it direct an accounting of the disbursements of public money to the land developer made while he controlled the district. The State of California has thus given to a private land developer the public powers and public assets, in violation of basic principles of law and of the California Constitution, Article 4 Section 31, and, since petitioner and other residents must repay the debt incurred by their taxes in the Estero District, the petitioner and other residents of the Estero District are deprived of their property without due process of law by the Estero Act and by the refusal of the California Supreme Court to remedy the improper past and future operation of the Estero District.

## II

## Voting Rights of Petitioner

The most obvious Constitutional defect of the Estero Act is the property qualification for the right to vote. Petitioner

respectfully refers to the dissenting opinion of Justice Mosk in Cooper vs. Leslie Salt Company at 70 Advance California pages 681 through 687, which opinion sets forth as well as Petitioner might the argument for enforcement of the "one man one vote" principle in the Estero Municipal Improvement District. Even the majority in that Opinion do not seem to rule that Petitioner is not entitled to the full voting rights under the "one man one vote" principle, but seem to rule, at 70 Advance California 680, that the land owners have some right arising out of their land ownership to a delay until late 1971 in the enforcement of the "one man one vote" principle. Justice Mosk states in his dissent in Cooper vs. Leslie Salt Company, at 70 Advance California page 681:

> "Many of the problems giving rise to plaintiff's dissatisfaction would dissolve if the people of the district had been, as everyone should be in a democratic society, the masters of their own destiny. Here the effective political and economic power rests not with the residents of the district, but with a regency. Like a vicarious government during a monarch's childhood, this district is ruled as if the people required protective guidance during their minority. However tolerable in another milieu, such paternalism is undesirable and invalid in this year 1969."
>
> "...
>
> "In my view, the Estero Act, as it presently exists, unquestionably violates the precepts laid down in *Avery vs. Midland County* (1968) 390 U.S. 474 [20 L.Ed.2d 45, 88 S.Ct. 1114], and the majority's holding that compliance with those constitutional principles may be deferred until a future date cannot be justified."

Justice Mosk continues at 70 Advance California Pages 686 and 687:

> "In the present case no obstacles to the immediate conduct of elections on a one-man, one-vote basis exist, and only the statutory postponement of the exercise of those rights until 1971 impedes implementation. This

action was filed in 1966, before the Legislature had made any provisions for elected representation of nonlandowners on the board. Three years have elapsed since that time and almost three more years will pass before the composition of the board complies with constitutional mandates. To wholly or partially deprive more than 8,000 residents of their constitutional right to an equal vote in unjust. That the injustice is to be cured in the future makes it no less unjust today."

## III

### Right of Petitioner that the Land Developer Account to the Estero District

It is a basic principle of law that where a fiduciary deals with the subject of his trust he has a duty to account to show that he did not secure an advantage for himself over the beneficiaries of the trust. California Civil Code Section 2235; Volume 4, Summary of California Law, Witkin, Page 2929. The fact that T. Jack Foster & Sons were fiduciaries for the Estero District is shown by the words of their attorney in these proceedings: "there is no question but that Mr. Foster or the Foster defendants control the District, in the same sense that the majority stockholder in a corporation controls a corporation. . ." (Cooper vs. Foster, Reporter's Transcript, Page 67 lines 7-14). Persons exercising a controlling interest in a corporation have a fiduciary duty regarding the corporation. Volume 3, Summary of California Law, Witkin, Pages 2390-2391.

Here T. Jack Foster & Sons had control over the Estero District because of the the property qualification for voting, and they caused the Estero District to disburse to themselves millions of dollars and controlled the manner in which it disbursed many other millions. This included causing the District to improve the lands of T. Jack Foster & Sons and then causing the District to purchase those lands at values based on the improved condition without any reimbursement or allow-

ance to the District for the improvement expense. The Estero Act provides no method for control over this private operation of a public district, and the Courts of the State of California have refused to terminate this private use of public powers and public monies and have also refused to compel any accounting for the funds which the land developer has caused the district to disburse to the land developer. Petitioner has been deprived of his property without due process of law because his property interest as a tenant of land within the Estero District (upon a 75 year leasehold) has been and is being charged with increasing public debt which is incurred by a government which has been entirely controlled by interested private persons and is still not a one man one vote representative government. He has no other recourse but to the Courts and This Court is the last tribunal open to him to secure representive government and public disclosure and control of dealings in public money in his local government.

## CONCLUSION

This Honorable Court should grant a Writ of Certiorari directed to the Supreme Court of the State of CAlifornia to create representative government and due process of law in the affairs of the Estero Municipal Improvment District.

Respectfully submitted:

Funsten & Caldwell
James W. Funsten
David B. Caldwell
COUNSEL FOR PETITIONER

# ADVANCE CALIFORNIA REPORTS

CASES DETERMINED IN THE SUPREME COURT

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[S. F. No. 22616. In Bank. Mar. 20, 1969.]

WALTER S. COOPER, Plaintiff and Appellant, v. LESLIE SALT COMPANY et al., Defendants and Respondents.

[S. F. No. 22617. In Bank. Mar. 20, 1969.]

WALTER S. COOPER, Plaintiff and Appellant, v. T. JACK FOSTER et al., Defendants and Respondents.

(Consolidated Appeals.)

[On hearing after decision by the Court of Appeal, First Appellate District, Division Four, Civ. Nos. 24800, 24801 (263 A.C.A. 632, 69 Cal.Rptr. 882) affirming the judgment of the superior court. Affirmed.]

[1a, 1b] **Municipal Corporations—Public Improvements—Improvement District.**—Once the existence of a municipal improvement district, created by an act not patently unconstitutional, is established, either de facto or de jure, a private person may not contest the validity of proceedings leading to its formation.

[2] **Corporations—Corporate Existence—De Facto Existence—Requisites.**—The elements prerequisite to de facto corporate status are: a charter or general law under which a corporation may be formed; a good faith attempted compliance with the

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[2] See Cal.Jur.2d, Corporations, § 46 et seq; Am.Jur.2d, Corporations, § 49 et seq.

McK. Dig. References: [1, 4] Municipal Corporations, § 402; [2] Corporations, § 51; [3] Corporations, § 61; [5] Judgments, § 10; [6] Municipal Corporations, § 103; [7] Municipal Corporations, § 479; [8] Pleading, § 53(2); [9] Fraud and Deceit, § 37(2); [10] Pleading, § 103(2); [11] Pleading, § 101(2); [12] Appeal and Error, § 967; [13] Municipal Corporations, § 471; [14] Appeal and Error, § 1230(2).

statues; colorable compliance with statutory requirements; and an assumption of the corporate powers.

[3] **Id.—Corporate Existence—Pleading—De Facto Existence.**—Absent an allegation that a municipal improvement district has not satisfied all the requirements prerequisite to de facto corporate status, it would, for the purpose of the pleading, at least be a corporation de facto.

[4] **Municipal Corporations—Public Improvements—Improvement Districts—Validity.**—A prior validation judgment purporting to establish the constitutionality of the "Estero Act" (Stat. 1961, 1st Ex. Sess., 1960, Ch. 82, p. 459), creating the Estero Improvement District and the validity of the district's bonds, rendered in an uncontested *in rem* proceeding, establishes that the district's existence is not subject to attack in an action attacking the manner in which municipal improvements and services were financed by the district, of which plaintiff is a taxpayer.

[5] **Judgments — Declaratory Judgments — Constitutionality of Statutes.**—Declaratory relief was not available to a party to attack the existence of a municipal corporation on the ground that the statute creating it was unconstitutional, where such party could not have mantained a quo warranto action in his own name.

[6] **Municipal Corporations — Powers — Reclamation of Private Property.**—The reclamation of private lands which are not all swamp and overflowed lands may be a valid public purpose; and the language of a statute creating a public improvement district authorizing reclamation of submerged or other lands which speaks of "watering or dewatering" but does not specifically mention filling, does not suggest that filling an area described as "dry private land" could never come within the scope of "watering or dewatering," where it was conceivable that lands not actually submerged might be in need of reclamation by means of "watering or dewatering."

[7] **Id.—Actions—Rights and Remedies of Taxpayers—Recovery of Illegal Expenditures.**—A general demurrer was correctly sustained as to an attempt to allege a taxpayer's cause of action to recover sums of an improvement district allegedly applied to private purposes where the complaint did not allege any specific manner in which public moneys of the district had been applied to private purposes, and went no further than to hint at a general subject matter as to which plaintiff felt aggrieved, and where, if all the allegations had been accepted as true, the court would have been unable to deter-

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[5] See **Cal.Jur.2d**, Declaratory Relief, § 60; **Am.Jur.2d**, Declaratory Judgments, § 25.

mine whether plaintiff was entitled to any recovery in behalf of the district.

[8] **Pleading—Complaint—Particular Averments—Right of Plaintiff.**—A complaint hinting at sinister activities on the part of defendant did not state a cause of action where there was no allegation of anything unlawful or illegal in the activities complained of.

[9] **Fraud—Actions—Pleading—Allegation of Facts.**—Fraud is never presumed; facts constituting fraud must be specifically pleaded; the court must be able to determine from the complaint that a prima facie case is alleged; thus a complaint failed to state a cause of action where it neglected to set forth any specific facts which would establish that an agent of defendants acted fraudulently.

[10] **Pleading—Demurrer to Complaint—Amendment After Demurrer Sustained—Discretion of Court.**—Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment.

[11] **Id. — Demurrer to Complaint — Determination — Complaint Containing One or More Good Counts.**—If one count of a complaint does state a cause of action, it is an abuse of discretion to sustain a general demurrer as to that count.

[12] **Appeal — Review—Judgment on Demurrer — Amendment After Demurrer Sustained.**—On appeal from a judgment sustaining a general demurrer to a complaint without leave to amend, the burden is on the plaintiff to demonstrate that the trial court abused its discretion; plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading; and plaintiff failed to sustain such burden on appeal where he made no attempt to demonstrate to the appellate court how he could amend his complaint to state a cause of action and, though he insinuated multiple wrongs by defendants, never pointed out in what manner the insinuations could be combined to state a cause of action.

[13] **Municipal Corporations—Actions—Rights and Remedies of Taxpayers—Constitutional Questions.**—Assuming that the Estero Municipal Improvement District exercises general governmental powers within the purview of *Avery* v. *Midland County*, 390 U.S. 474 [20 L.Ed.2d 45, 88 S.Ct. 1114], that equal protection demands equal apportionment of constituencies in units of local government having general governmental power, in a taxpayer's action attacking the financing of municipal

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[10] See **Cal.Jur.2d**, Pleading, § 167 et seq; **Am.Jur.**, Pleading (1st ed § 249).

improvements and services by the district in which plaintiff made some attempts to raise issues regarding district elections, no occasion was shown for interference by the court with the programming spelled out by the Legislature whereby it recognized that, as the character of the district gradually changed from uninhabited to that of an area with substantial members of resident registered voters, it was appropriate that voting power likewise gradually shift, and provided for gradual transfer of control from owners to resident voters which will be completely accomplished by the close of 1971.

[14] **Appeal—Review—Questions of Law and Fact—Taking Evidence.**—It is not a function of an order under Cal. Rules of Court, Rule 23, subd. (b), to afford a party the facilities of an appellate court for exploratory investigation to try to develop facts sufficient to enable him to state a cause of action.

APPEALS from judgments of the Superior Court of San Mateo County. James T. O'Keefe, Judge. Affirmed.

Actions by taxpayers attacking the manner in which municipal improvements and services are to be financed by a municipal improvement district. Judgments of dismissal after demurrers to complaints sustained without leave to amend affirmed.

Funsten & Caldwell and James W. Funsten for Plaintiffs and Appellants.

Chickering & Gregory, W. Burleigh Pattee, William E. Trautman, Long & Levit, Bert W. Levit, Gerald Z. Marer, Victor B. Levit, Wilson, Jones, Morton & Lynch and John E. Lynch for Defendants and Respondents.

BURKE, J.—In this controversy over the establishment and operation of a special improvement district, a hearing was granted by this court, after decision by the Court of Appeal, First Appellate District, Division Four, for the purpose of giving further study to the problems presented. After such study we have concluded that the opinion of the Court of Appeal, prepared by Justice Christian, correctly treats and disposes of the issues involved, and with certain further comments pertinent to contentions urged, it is adopted as and for the opinion of this court. Such opinion (with appropriate deletions and additions as indicated) is as follows:[1]

[1]Brackets together, in this manner [ ], are used to indicate deletions from the opinion of the Court of Appeal; brackets enclosing material

Plaintiff Walter S. Cooper appeals from judgments of dismissal[2] which followed the sustaining of general demurrers without leave to amend in an action attacking the manner in which respondents have caused municipal improvements and services to be financed by the Estero Municipal Improvement District, of which appellant is a taxpayer.

The district was established by special act [Estero Act] of the Legislature. (Stats. 1961, 1st Ex. Sess. 1960, ch. 82, p. 459.) The act prescribed the boundaries, organization and powers of the district, as well as methods for its operation, management, financing, change of boundaries, and dissolution. Provision is made in section 121 of the act for an in rem proceeding to establish the validity of "the creation of the district and any annexations thereto" or to determine its right to issue bonds.

A judgment purporting to establish the constitutionality of the act creating the district and the validity of the district's bonds was rendered in a noncontested *in rem* proceeding in the Superior Court of San Mateo County on July 20, 1961.

The statute recited that "The land in the district is not owned by residents. The owners are the ones primarily concerned with the district and the ones who will be supporting the district. The owners should therefore hold the voting power." (§ 215, subd. (f).) Thus it was provided that voting was to be upon the basis of assessed valuation of land [ ] [§§ 17, 19, 20, 64], and that the district was to be governed by three directors (§ 26) who must be "owners, or officers or legal representatives of owners" (§ 28). The statute places a broad array of municipal functions within the powers of the district, including provision of street lighting, sewerage, storm drainage, garbage service, water service, parks and playgrounds, and reclamation of [ ] land (§ 77). The dis-

(other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. We thus avoid the extension of quotation marks within quotation marks which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted. (*Simmons* v. *Civil Service Emp. Ins. Co.* (1962) 57 Cal.2d 381, 383, fn. 1 [19 Cal.Rptr. 662, 369 P.2d 262]; *Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 540, fn. 1 [63 Cal.Rptr. 21, 432 P.2d 717]; *Smith* v. *Anderson* (1967) 67 Cal.2d 635, 637, fn. 1 [63 Cal.Rptr. 391, 433 P.2d 183]; *McDonnell Douglas Corp.* v. *Franchise Tax Board* (1968) [a]69 Cal.2d ——, ——, fn. 1 [72 Cal.Rptr. 465, 446 P.2d 313].)

[2]Two judgments were entered on separate dates as to two groups of defendants. Plaintiff appeals from both judgments; the issues are identical and the appeals have been consolidated.

[a]Advance Report Citation: 69 A.C. 524, 526, fn. 1.

trict is also empowered to construct small craft harbors (§ 78), provide fire protection (§ 79), and "make and enforce all necessary and proper regulations, not in conflict with the laws of this State, for the . . . supplying of . . . police protection service. A violation of a regulation of the district is a misdemeanor punishable as such." (§ 97.) The statute includes elaborate financial provisions, including authorization for the directors to issue general obligation bonds (§§ 105-123) and other types of securities to raise money for development of the raw land included within the district so that the owners thereof, who absolutely control the operations of the district,[3] can cause the various improvements to be made which are necessary to make the land fit for marketing as a residential tract. (See Willoughby, *The Quiet Alliance*, (1965) 38 So.Cal.L.Rev. 72, for a review of several comparable special statutes under which governmental powers have been made serviceable to land developers.)

Appellant's complaint, alleging four causes of action upon various theories, was amended twice before a general demurrer was sustained without leave to amend. Because the four causes of action contain overlapping allegations, and the dismissal was upon a general rather than a special demurrer, we shall analyze as a whole all of the factual allegations of the complaint to determine (1) whether any cause of action was stated, and (2) whether the trial court committed an abuse of discretion in cutting off further amendment.

There is no allegation that the formation and operation of the district failed to conform to the provisions of the Estero Act; rather it is charged that the act itself is void in that it purports to create a corporation for municipal purposes by special act of the Legislature in violation of article XI, section 6, of the California Constitution.[4]

**[1a]** Respondents contend that Code of Civil Procedure section 803 precludes appellant from contesting the validity

[3] After the dismissal of this action the act was amended [§§ 26, 28], to enlarge the board of directors to five members, of which two represent landowners, two represent residents, and one is a "public member" appointed by the county board of supervisors. After 1969, the "public member" will also be elected by the residents of the district, [and after 1971 the two directors now representing landowners will likewise be elected by the residents]. (Stats. 1967, ch. 1511, §§ 3, 5.)

[4] Article XI, section 6: "Corporations for municipal purposes shall not be created by special laws; but the Legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, . . ."

of proceedings leading to the formation of the district. Section 803 provides:

"An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure of de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor."

In *San Ysidro Irr. Dist.* v. *Superior Court* (1961) 56 Cal.2d 708 [16 Cal.Rptr. 609, 365 P.2d 753], [ ] [this] court held that, absent constitutional or statutory regulations providing otherwise, quo warranto is the only proper remedy in cases in which it is available. Therefore, it is the exclusive remedy for testing the legality of the existence of an irrigation district. As those districts are delegated agencies of the state government their existence should not be subject to attack at the caprice of private interests, but should be open to question only in a direct proceeding controlled by an officer charged with protecting the public interest. The court therefore held that the superior court would not have jurisdiction of an action challenging the lawful existence of a special district unless brought by the Attorney General.

In *City of San Diego* v. *Otay Municipal Water Dist.* (1962) 200 Cal.App.2d 672 [19 Cal.Rptr. 595], the city brought an action to enjoin the [ ] [furnishing of water to inhabitants of an improvement district]. Three landowners intervened seeking a determination of the validity of proceedings resulting in the formation of the district. The court held [p. 681] that the interveners had no authority to bring the action to annul the existence of the district on the grounds that it was invalidly formed or that the statute under which it was formed was unconstitutional. Such a remedy is not available to a taxpayer; it is within the exclusive province of the Attorney General through a quo warranto action. (Accord *Wilson* v. *City of San Bernardino* (1960) 186 Cal.App.2d 603 [9 Cal. Rptr. 431]; 41 Cal.Jur.2d, Quo Warranto, § 5, p. 614; 74 C.J.S., Quo Warranto, § 5, p. 183; 74 C.J.S., Quo Warranto, § 4, 179-181.)

Appellant contends that quo warranto is not the exclusive remedy here because the Estero district is neither de facto nor de jure a corporation, citing *Brandenstein* v. *Hoke* (1894) 101 Cal. 131 [35 P. 562]. There the court found patently unconstitutional, a statute under which a levee district was formed [and denied recovery to plaintiff bondholder who sought to compel defendant board of supervisors to levy and collect a tax to pay the bonds]. The court considered that because there was no valid statute under which the purported corporation could have been created, no de facto corporation could exist. But later cases have held that without regard to the claimed unconstitutionality of any statute, it is only where proceedings to create a district have not been fully completed that a private citizen can question their validity. (*Alden* v. *Superior Court* (1963) 212 Cal.App.2d 764, 769-770 [28 Cal.Rptr. 387]; *City of Colton* v. *City of Rialto* (1964) 230 Cal.App.2d 174 [40 Cal.Rptr. 766]; *Hazelton* v. *City of San Diego* (1960) 183 Cal.App.2d 131, [135] [6 Cal.Rptr. 723]; [see also *Lorty* v. *Anderson* (1963) 60 Cal.2d 312, 316 [33 Cal.Rptr. 97, 384 P.2d 417]].) **[2]** The following elements are prerequiste to de facto corporate status: (1) there must be a charter or general law under which a corporation may be formed; (2) there must be a good faith attempted compliance with the statute; (3) there must be a colorable compliance with the statutory requirements; and (4) there must be an assumption of the corporate powers. (1 McQuillan, Municipal Corporations, § 3.48; *City of Colton* v. *City of Rialto, supra,* 230 Cal.App.2d 174, 182.) **[3]** There is no allegation that the Estero District has not satisfied all these requirements; thus it would at least be a corporation de facto. **[1b]** Moreover, since the act is not patently unconstitutional, the rule of *Brandenstein* v. *Hoke, supra,* does not apply. Once the district's existence is established, either de facto or de jure, it follows that a private person may not contest the validity of proceedings leading to its formation. (*Hazelton* v. *City of San Diego, supra,* 183 Cal.App.2d 131, 135.) **[4]** In the present case the prior validation judgment declared that the district was validly created. [ ] [The district's existence is thus not subject to the attack here attempted.]

**[5]** Appellant advances a subsidiary contention that he ought to be allowed to attack the constitutionality of the Estero Act because, in one of the causes of action, he seeks a judicial declaration that the statute is unconstitutional. But in *San Ysidro Irr. Dist.* v. *Superior Court, supra,* 56 Cal.2d

708, 715, it was held that because the declaratory judgment law was not designed to undermine the policy of the quo warranto statute, the existence of municipal corporations is not open to attack by private individuals. "The existing authorities in California support the view that declaratory relief would not be available to a party in these circumstances which could not maintain a quo warranto action in its own name." (56 Cal.2d at p. 715.)

The complaint alleges that $30,000,000 of the district's funds was "spent to improve and make saleable the real property of [the Foster defendants] under the claim that said expenditure is authorized as reclamation. . . ." In his capacity as a district taxpayer appellant prayed for a judgment requiring restoration of that amount to the district. **[6]** Appellant contends here that the district is not empowered to fill dry land. It is true that section 77 of the act, authorizing reclamation of "submerged or other land" speaks of "watering or dewatering" and does not specifically mention filling. It is also true that section 78, which authorizes reclamation by grading, excavation and filling, refers only to "small craft harbor purposes." Appellant seems to contend that filling of an area described only as "dry private land" could never come within the scope of "watering or dewatering." The language of the statute does not suggest that conclusion; it is conceivable that land not actually submerged might be in need of reclamation by means of "watering or dewatering." The reclamation of private lands which are not all swamp and overflowed lands may be a valid public purpose. (*Islais Creek Rec. Dist.* v. *All Persons* (1927) 200 Cal. 277, 283 [252 P. 1043].) **[7]** Moreover, the complaint alleges that the work done was not reclamation at all because it was "for [other] improvement of dry private land of said defendants." That language is so broad as to bring into play the whole array of services mentioned in section 77 (e.g., sewerage, storm drainage, and "distribution of water for public and private purposes") which may be proper functions of a governmental entity even though private property is incidentally benefited. Appellant has never alleged any specific manner in which public monies of the district have been applied to private purposes. The allegations we have reviewed go no further than to hint at a general subject matter as to which plaintiff feels aggrieved; if all those allegations were accepted as true the court would have been unable to determine whether plaintiff was entitled to any recovery whatever in behalf of the

district. The general demurrer was therefore correctly sustained as to the attempt to allege a taxpayer's cause of action.

**[8]** The complaint then sets forth miscellaneous general allegations hinting at sinister activities on the part of certain of the respondents:

(a) It is alleged that the Foster respondents "have secured for themselves the power to control and administer the bookkeeping of said district for a compensation. . . ."

(b) It is alleged that the Foster respondents have, by virtue of their control and domination of the district, "obtained great private monetary advantage. . . ."

(c) It is alleged that Innes, a Foster employee and a director of the district, caused the Associated Dredging Company to submit statements to the district pursuant to which two district checks totaling $860,218.05 were issued and delivered to Associated with the understanding that they would be indorsed to respondent Midwest Dredging Corporation, a Foster subsidiary. It is alleged that Midwest received a further $1,667,183.80 upon claims it presented directly to the district.

None of these recitals states a cause of action. There is no allegation that there was anything unlawful about the manner of contracting for bookkeeping services for the district; neither is any showing of illegality alleged with regard to the payments to Associated Dredging and Midwest Dredging. **[9]** It is possible that appellant intended to allege fraudulent misappropriations of district funds, but fraud is never presumed—facts constituting fraud must be specifically pleaded. (*Gautier* v. *General Tel. Co.* (1965) 234 Cal.App.2d 302, 308 [44 Cal.Rptr. 404].) The court must be able to determine from the complaint that a prima facie case is alleged. (Chadbourne, Grossman, Van Alstyne, 2 California Pleading, § 982.) Here the complaint neglects to set forth any specific facts which would establish that Innes acted fraudulently. For example, appellant does not allege that the work was poorly done or not done at all. He does not allege facts to show that the $860,218.05 was a higher amount than a contract called for. Appellant does not allege that there was anything fraudulent about the endorsement of the checks by Associated to the Foster subsidiary. Possibly the two firms were joint venturers in the reclamation work.

**[10]** Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. (*Tem-*

*escal Water Co.* v. *Department of Public Works* (1955) 44 Cal.2d 90, 107 [280 P.2d 1].) **[11]** If one count of a complaint does state a cause of action, it is an abuse of discretion to sustain the demurrer as to that count. (*Western Title Ins. etc. Co.* v. *Bartolacelli* (1954) 124 Cal.App.2d 690, 694 [269 P.2d 165].) **[12]** However, the burden is on the plaintiff to demonstrate that the trial court abused its discretion. (*Filice* v. *Boccardo* (1962) 210 Cal.App.2d 843, 847 [26 Cal.Rptr. 789]; *Starbird* v. *Lane* (1962) 203 Cal.App.2d 247, 262 [21 Cal.Rptr. 280]; *Schultz* v. *Steinberg* (1960) 182 Cal.App.2d 134, 140 [5 Cal.Rptr. 890].) Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. (*Saint* v. *Saint* (1932) 120 Cal.App. 15, 23-24 [7 P.2d 374].) Here appellant has never advanced, either in the trial court or before us, any effective allegation which he could now make if further amendment to the complaint were to be permitted. Although he insinuates multiple wrongs by respondents, he never points out in what manner those insinuations could be combined to state a cause of action. (See *Schultz* v. *Steinberg*, *supra*, at p. 141.)

**[13]** Appellant also contends that reversal is required by the recent holding of the United States Supreme Court in *Avery* v. *Midland County* (1968) 390 U.S. 474 [20 L.Ed.2d 45, 88 S.Ct. 1114] that equal protection demands equal apportionment of constituencies in units of local government having general governmental powers. The complaint did make some attempt to raise issues regarding district elections. It alleged: "Said act and the purported district are in conflict with the Constitution of the United States of America in that, among other things, the power to vote in said district is divided according to assessed valuation rather than equally among persons." [ ] [However, even if it be assumed without deciding that defendant district exercises general governmental powers within the purview of *Avery* (see also *Thompson* v. *Board of Directors* (1967) 247 Cal.App. 2d 587, 590-592 [55 Cal.Rptr. 689]), the Legislature has already made provision for transfer of control from the owners to the residents. As stated (*ante*, fn. 3), by amendment of the Estero Act (Stats. 1967, ch. 1511) the governing board was increased to five members commencing in December 1967 (§ 26), two of whom are required to be and to be elected by registered voters resident within the district (§ 28). After December 1969 the member now appointed by the county board of supervisors

will also be elected by resident registered voters, and after December 1971 the offices of the present two landowner-directors will similarly be filled by vote of residents. (§ 28.)

[It appears that at the time the district was created by the Legislature in 1960 it comprised some 418 uninhabited acres under a single ownership, that thereafter it annexed adjacent territory (§ 205) so that it now totals some 2,600 acres, and that as improvement and development have proceeded the district has acquired residents. The statute declares the desirability that upon creation of the district the owners hold the voting power, as they were the persons primarily concerned with the district and who would be supporting it. (§ 215.)[5] However, the Legislature has recognized that as the character of the district gradually changes from uninhabited to that of an area with substantial members of resident registered voters it is appropriate that voting power likewise gradually shift. Since the transfer of control from owners to resident voters will be completely accomplished by the close of 1971, no occasion is shown for interference by this court with the programming spelled out by the Legislature. (See *Silver* v. *Brown* (1965) 63 Cal.2d 270, 274-275 [46 Cal.Rptr. 308, 405 P.2d 132]; *Miller* v. *Board of Supervisors* (1965) 63 Cal.2d 343 [46 Cal.Rptr. 617, 405 P.2d 857].)]

**[14]** At oral argument [before the Court of Appeal, when this cause was pending before that court] appellant moved, pursuant to rule 23, subdivision (b), California Rules of Court, for an "Order Directing Taking of Evidence on Appeal" to assist [ ] [The] court in determining whether the superior court correctly ordered the amended complaint dismissed as sham[6] and "whether there are additional facts not referred to in the complaint herein, which are within the subject matter of the complaint and as to which appellants should be allowed an opportunity to plead." We do not con-

[5]Section 215 of the statute further declares, among other things, the purpose of enabling improvement of the area; that the area was without sewage facilities, adequate water supply, or small craft harbor facilities, all of which it urgently needed; that the area is of strategic importance during times of war or threatened war, and that influx of military men and their families during such times greatly increases the necessity of providing facilities.]

[6]The Foster respondents and some of the other respondents moved to strike the complaint as amended, on the ground that it was "sham, vexatious, scandalous, abusive, disrespectful, frivolous," etc. The order granting the motion to strike was concurrent with the order sustaining the demurrer. The judgment of dismissal is adequately supported by the ruling upon the demurrer; therefore we have not considered the propriety of the motion to strike.

sider it a function of an order under rule 23, subdivision (b), to afford a party the facilities of the appellate court for exploratory investigation to try to develop facts sufficient to enable him to state a cause of action.

The judgments are affirmed; the motion to take evidence is denied.

Traynor, C. J., McComb, J., and Tobriner, J., concurred.

MOSK, J.—I concur in part and dissent in part.

On the basis of the complaints in these proceedings and in the companion case, there arise suspicions that all is not well with the management of the Estero community. But suspicions, however strong, are inadequate for pleading purposes. Thus I concur in much of the majority opinion.

Many of the problems giving rise to plaintiff's dissatisfaction would dissolve if the people of the district had been, as everyone should be in a democratic society, the masters of their own destiny. Here the effective political and economic power rests not with the residents of the district, but with a regency. Like a vicarious government during a monarch's childhood, this district is ruled as if the people required protective guidance during their minority. However tolerable in another milieu, such paternalism is undesirable and invalid in this year 1969.

Therefore I dissent from that portion of the majority opinion which holds that because "the transfer of control from owners to resident voters will be completely accomplished by 1971 no occasion is shown for interference by this court with the programming spelled out by the Legislature."

In my view, the Estero Act, as it presently exists, unquestionably violates the precepts laid down in *Avery* v. *Midland County* (1968) 390 U.S. 474 [20 L.Ed.2d 45, 88 S.Ct. 1114], and the majority's holding that compliance with those constitutional principles may be deferred until a future date cannot be justified. I would hold that the Supreme Court one-man, one-vote command is not satisfied by the one-man, three-fifths-of-a-vote practice now prevailing in the Estero community. (Maj. Opn. fn. 3.)

In *Avery* the Supreme Court held that the one-man one-vote principle enunciated in *Reynolds* v. *Sims* (1964) 377 U.S. 533 [12 L.Ed.2d 506, 84 S.Ct. 1362], is applicable to districts of local government and that the Constitution permits no substantial variation from equal population in establishing units of local agencies having general governmental powers. The

Midland County Commissioners Court, the elective body involved in *Avery*, was empowered to establish a courthouse and jail, appoint numerous minor officials, fill vacancies in the county offices, let contracts in the name of the county, build roads and bridges, administer the county's public welfare services, perform numerous duties in regard to elections, set the county tax rate, issue bonds, adopt a budget, serve as a board of equalization, and build and operate various public facilities.

The local governing body in *Avery* had the "power to make a large number of decisions having a broad range of impacts on all the citizens of the county" and to make "long-term judgments" affecting the future development and the present needs of the county. The opinion states, "Were the Commissioners Court a special purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such bodies may be apportioned in ways which give greater influence to the citizens most affected by the organizations' functions. That question, however, is not presented by this case, for . . . the relevant fact is that the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens" of the county. Similarly, in *Pierce* v. *Village of Ossining* (S.D.N.Y. 1968) 292 F.Supp. 113, a statute limiting the right to vote in local elections to property owners was held to constitute a denial of equal protection of the laws.

In California we have applied the one-man, one-vote principle of *Reynolds* v. *Sims* (1964) *supra*, 377 U.S. 533, to elections for county boards of supervisors which serve local legislative and administrative functions. (*Miller* v. *Board of Supervisors* (1965) 63 Cal.2d 343, 348 [46 Cal.Rptr. 617, 405 P.2d 857].)

While the present case does not involve the problem of malapportionment of elective districts but discrimination between voters who own and those who do not own real property within the district, as well as between small and large landowners, it is inescapable from the holding of *Avery* that if the district's board may exercise general governmental powers over the residents of the district, the voters therein must be accorded equal voting rights on a one-man, one-vote basis, without regard to whether or not they own property within the district or the amount thereof. (See *Thompson* v. *Board of*

*Directors* (1967) 247 Cal.App.2d 587, 590-592 [55 Cal.Rptr. 689].)

An analysis of the terms of the Estero Act establishes that the district is not a "special purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents." Indeed it is difficult to contemplate a broader spectrum of general governmental functions than those bestowed upon the Estero community. The district is empowered to acquire, construct and maintain facilities for street lighting, collection and disposal of sewage, production and distribution of water, parks, playgrounds and drainage works, and may reclaim submerged or other land by watering or dewatering (Estero Act, § 77). It may acquire or construct a private small craft harbor and utilities useful to its operation (§ 78). It may also operate and equip fire and police departments (§ 79), construct gas, telephone and electrical facilities (§ 79a), hold or dispose of property within or without the district (§ 80), and exercise the right of eminent domain for the condemnation of private property for public use in the same manner as the legislative body of a city (§ 81). It may make such contracts as appear necessary or proper (§ 83) and make and enforce regulations necessary to the exercise of the functions given it by the act. A violation of these regulations constitutes a misdemeanor (§ 97).

The governing board has very broad financial powers. It may borrow money (§ 85), issue general obligation bonds (§ 105 et seq.) and revenue bones (§ 135), and cause special assessments to be levied and issue bonds to represent unpaid assessments (§ 93). Taxes to pay the principal and interest on the bonds and to defray expenses incidental to the district's powers are levied, under the act, on the real and personal property in the district (§ 160 et seq.).

This comprehensive range of authority is in some respects more embracive than that accorded the Commissioners Court in *Avery* and most, if not all, of the powers affect all residents of the district alike, without regard to the amount, if any, of real property they own in the district. Under these circumstances there seems little doubt that plaintiff and other residents of the district are deprived of equal protection of the laws by the requirement that a certain number of members of the governing board be elected only by landowners and that voting power among landowners should be divided according to assessed valuation. As stated in *Harper* v. *Virginia Board*

*of Elections* (1965) 383 U.S. 663, 666 [16 L.Ed.2d 169, 172, 88 S.Ct. 1079]: ". . . a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter . . . an electoral standard. Voter qualifications have no relation to wealth. . . ."

The majority holds that even if present methods of voting are of dubious validity, the Legislature has provided for the gradual transfer of control of the district to the residents by elections to be held in November 1971, and we are not justified in tampering with this scheme.[1] The only authority cited for this proposition is *Silver* v. *Brown* (1965) 63 Cal.2d 270, 274-275 [46 Cal.Rptr. 308, 405 P.2d 132], and *Miller* v. *Board of Supervisors* (1965) 63 Cal.2d 343, 350 [46 Cal.Rptr. 617, 405 P.2d 857]. Both these cases, decided in September 1965, not only fail to support the majority's holding but they teach us that dilatoriness and deferred reapportionment plans are unacceptable. In *Silver* we held that although the California Senate and Assembly should be accorded an opportunity to reapportion themselves since they had previously failed to agree upon a plan and since a delay until the next regular session was not justified, this court would itself promulgate a reapportionment plan for the forthcoming election unless a special session of the Legislature passed a constitutionally adequate reapportionment plan in time for that election. In *Miller* we ordered invalidly apportioned supervisorial districts to be reapportioned by the Board of Supervisors of Santa Clara County within 90 days so that the next election would be based upon the newly apportioned districts. In neither *Silver* nor *Miller* would this court tolerate procrastination; in both instances we insisted upon one man, one vote at the immediately forthcoming election, although the factors involved in reapportionment were complicated and politically volatile. Moreover, in *Silver* respondents urged cogent reasons for delaying reapportionment, i.e., that compliance with certain provisions of the Elections Code was difficult because of the time factors involved, but we resolutely held nevertheless that a delay was not justified. Finally, in both *Silver* and

[1]This is somewhat reminiscent of the noblesse oblige evidenced by the court in *People* v. *Sacramento Drainage Dist.* (1909) 155 Cal. 373 [103 P. 207], when it approved creation of a governmental agency to carry out a single purpose, and said (at p. 382): "It is in accord with the progressive spirit of our government to give to the people, or any part of them, the largest possible control in matters peculiarly affecting them and their interests. It is a concession to this spirit, and not the compulsion of the law, which prompts the legislature to give the landowners so large a voice in the management of these affairs."

*Miller* no constitutional reapportionment plans were then in existence, and this court, although reluctant to undertake formulation of a program, was willing to do so if necessary to preserve the constitutional rights of the voters at the next election.

Here we are presented with a much stronger case for immediate implementation of the voting rights of citizens than in either *Silver* or *Miller*, for, by contrast, no new reapportionment plan need be designed. The Legislature itself has passed a complete scheme to effectuate the voting rights of the district's residents down to the details regarding the manner in which both regular and special elections should be conducted, but has provided that the statute, passed in 1967, should not be fully implemented until the elections to be held in November 1971. (Stats. 1967, ch. 1511.) There are no complicated policy questions here relating to whether the Legislature should be given an initial opportunity to carry out the constitutional mandate before this court acts. The only reason advanced by the majority for holding that the district's residents are not entitled to an equal vote until 1971 is that there were no residents in the district when it was originally formed and that the Legislature has made a determination that when substantial numbers of voters move into the district the voting power should gradually shift to the residents.

The flaw in the program, unanswered by the majority, is the lack of justification for waiting until November 1971, if there are a substantial number of resident voters long before that date. The uncontroverted fact is that there are now more than 8,000 persons residing in the district and the steady influx indicates there will be many more prior to the time an election is held in November 1971. No one can deny that there are a substantial number of registered voters among the residents. It seems hardly necessary to note parenthetically that if the legislative bodies involved in the *Silver* and *Miller* cases had passed valid reapportionment measures but had delayed their effectiveness for four years because it was their judgment that the equal voting rights of citizens should be implemented gradually, this court would not have conntenanced such a dilatory arrangement.

Indeed, a recent case involved just that situation. In *Petuskey* v. *Rampton* (1965) 243 F.Supp. 365, 369-374, the Utah Legislature was reapportioned by an act, passed in 1965, but not to be effective until 1969. The court held this provision to be in violation of the federal Constitution and ordered that the reapportionment become effective at the next election at

which it was mechanically possible to put the plan into operation.

*Silver* and *Miller* are not the only cases which have recognized the urgency of prompt action in order to assure that voters are not deprived of their rights one day longer than necessary. *Reynolds* v. *Sims* (1964) *supra*, 377 U.S. 533, states (at p. 585 [12 L.Ed.2d at p. 541]) that ". . . once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."[2] A number of commentators have also emphasized the necessity for promptness because "every day that a legislature elected under an invalidated system is allowed to sit results in the perpetuation of the wrong for which a remedy is sought." (*The Case for District Court Management of the Reapportionment Process*, 114 U.Pa.L.Rev. 504, 510; McKay, Reapportionment (1965) 161-162.) Many courts have taken heroic measures in order to avoid an undue postponement of relief. For example, state constitutional measures setting forth "time lock" provisions have been bypassed (*Buckley* v. *Hoff* (D.Vt. 1964) 234 F.Supp. 191, 198), deadlines have been set, such as those in *Silver* and *Miller*, and even where practical considerations have called for permitting elections to be conducted on the basis of unvalidly apportioned districts some courts have reduced the terms of the representatives elected under the unconstitutional system. (*Hughes* v. *WMCA, Inc.* (1965) 379 U.S. 694, 695 [13 L.Ed.2d 698, 699, 85 S.Ct. 713]; for a summary of some remedial measures adopted by the courts see *The Case for District Court Management of the Reapportionment Process, supra*, 114 U.Pa.L.Rev. 504.)

In the present case no obstacles to the immediate conduct of elections on a one-man, one-vote basis exist, and only the statutory postponement of the exercise of those rights until 1971 impedes implementation. This action was filed in 1966, before the Legislature had made any provisions for elected represen-

[2]This injunction is qualified by the further statement that "in awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws" and that "a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." (377 U.S. at p. 585.) No claim is made that any of the foregoing factors justifying a delay are present here.

tation of nonlandowners on the board. Three years have elapsed since that time and almost three more years will pass before the composition of the board complies with constitutional mandates. To wholly or partially deprive more than 8,000 residents of their constitutional right to an equal vote is unjust. That the injustice is to be cured in the future makes it no less unjust today.

Peters, J., and Sullivan, J., concurred.

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[Civ. No. 22619. In Bank. Mar. 20, 1969.]

WALTER S. COOPER, Plaintiff and Appellant, v. ESTERO MUNICIPAL IMPROVEMENT DISTRICT et al., Defendants and Respondents; T. JACK FOSTER et al., Interveners and Respondents.

[1] **Mandamus—Pleading—Amendment.**—In a taxpayer's mandamus proceeding to test the activities of the Estero Municipal Improvment District, its directors, and certain landowner developers of the district, in which petitioner filed a cross-complaint couched in 10 causes of action to a complaint in intervention filed in behalf of 2,000 residents of the district, designating as defendants the district, its directors, the landowner developers, the residents, and others, the trial court properly denied plaintiff petitioner's motion to amend his second amended mandamus petition so as to substitute the cross-complaint therefor, where the latter appeared to be plaintiff's seventh attempt to state a cause of action on substantially similar grounds.

[2] **Id.—Conditions Affecting Issuance—Acts and Duties Enforceable.**—Mandamus, being available only to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station (Code Civ. Proc., § 1085), was not a proper vehicle for redress of asserted taxpayer grievances arising from transactions between the Estero Municipal Improvement District and its developer landowners, and seeking an accounting for benefits received by the

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[2] See **Cal.Jur.2d**, Mandamus, § 2 et seq; **Am.Jur.**, Mandamus, (1st ed § 54 et seq).

**McK. Dig. References:** [1] Mandamus, § 95; [2, 3] Mandamus, § 6; [4, 5] Mandamus, § 88; [6] Mandamus, § 85(0.5); [7] Mandamus, § 85(2).

latter from the district, where petitioner plaintiff alleged nothing to indicate that the developer landowners had a duty to account to him nor that the district was enjoined by law to cause an investigation to be made of its disbursements to the developer landowners as prayed for alternatively in the petition, and where plaintiff petitioner did not allege that he was suing in behalf of the district or that he made demands upon the district to request an accounting from the developer landowners which was refused.

[3] **Id.—Conditions Affecting Issuance—Acts and Duties Enforceable.**—The remedy of mandate was inappropriate as to a second cause of action set forth in a mandamus petition challenging a certain transaction between the Estero Municipal Improvement District and a dredging company and praying that the district obtain an accounting in connection therewith, where the district had no duty to conduct the proposed investigation and there was no allegation of wrongdoing and no grounds alleged upon which a court might order an accounting.

[4] **Id.—Pleading—Demurrer to Petition.**—The trial court erred in sustaining a general demurrer to a third cause of action set forth in a mandamus petition, based on an asserted violation of the Estero Act, § 193 (Stats. 1963, Ch. 995), providing that if the district board appoint a depositary for its funds it shall appoint a finance officer who must be bonded for at least $250,000, and the allegations of the cause of action appeared sufficient against general demurrer, where the petition alleged that the district had appointed a depositary, that it had an appropriate bond until a certain time, but that plaintiff was informed and believed the district no longer carried a fiduciary bond in compliance with the section, and that the district had refused to inform plaintiff of the terms of any bond it might have, and where, the district in its return replied that a bond existed insuring "all offices and departments" of the district, so that it appeared on the face of the pleadings that the district did not have an individual bond for its finance officer as required by the section but that all of its employees were insured for the required sum in the aggregate.

[5] **Id.—Pleading—Demurrer to Petition.**—In a mandamus proceeding challenging activities of the Estero Municipal Improvement District and its directors, the allegations of a fourth cause of action contained in the petition seeking replacement of moneys transferred from the park fund of the district appeared incomprehensible, and the trial court acted

[4] See **Cal.Jur.2d**, Mandamus, § 64; **Am.Jur.**, Mandamus (1st ed § 362).

properly in sustaining a demurrer thereto, where it was alleged that certain money was transferred from the park fund to a reclamation fund, that the money in the reclamation fund would be used to make interest payments on reclamation bonds, that future interest payments would exceed the reclamation fund so that additional moneys would be removed from other bond funds or transferred to the reclamation fund, and where the broad general allegation that all such activities were in violation of law was merely a conclusion and no facts were alleged justifying the granting of any relief.

[6] **Id.—Petition—Sufficiency.**—In a mandamus proceeding challenging activities of the Estero Municipal Improvement District and its directors, the allegations of a purported fifth cause of action contained in the petition failed to state a cause of action seeking judgment that none of bond sale proceeds be used for payment of interest on prior bonds, where it did not appear that the payment of such interest from bond proceeds was illegal or that the law required that a bond election specifically authorize the use of proceeds for payment of interest, where, according to the Estero Act, §§ 106 and 107 (Stats. 1960, 1st Ex. Sess., Ch. 82), the board may call a bond election by a resolution which may submit to the voters the question of issuing bonds to make all outlays or so many of them as may be selected, and where the cause of action alleged that the board in its resolution stated that a certain amount of current bond sales would be used to pay interests on bonds, and there was no allegation that the provisions of the section were not complied with as to other bond sales mentioned in the cause of action.

[7] **Id.—Pleading—Showing of Right of Petitioner and Power of Duty of Respondent.**—In a mandamus proceeding challenging activities of the Estero Municipal Improvement District, its directors, and certain landowner developers thereof, plaintiff was entitled to no remedy under the nebulous allegations of a purported sixth cause of action seeking to compel the district to obtain a welter of financial details and other information from the landowner developers before expenditure of further funds for their benefit, where plaintiff alleged nothing to indicate any duty on defendants' part resulting from an office, trust, or station, or any act, performance of which by defendants was specially enjoinable by law.

APPEAL from a judgment of the Superior Court of San Mateo County. James T. O'Keefe, Judge. Affirmed in part and reversed in part.

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[7] See **Cal.Jur.2d**, Mandamus, § 61; **Am.Jur.**, Mandamus (1st ed § 344 et seq).

Proceeding in mandamus challenging in six causes of action activities of the Estero Municipal Improvement District, its directors, and landowner developers of the district. Judgment of dismissal after demurrers to second amended petition sustained reversed only as to petition for performance bond and affirmed in all other respects.

Funsten & Caldwell, James W. Funsten and David B. Caldwell for Plaintiff and Appellant.

Wilson, Jones, Morton & Lynch, John E. Lynch and Robert G. Auwbrey for Defendants and Respondents.

Long & Levit, Bert W. Levit and Victor B. Levit for Interveners and Respondents.

BURKE, J.—Plaintiff is a resident and taxpayer in the Estero Municipal Improvement District, which was created by special act of the Legislature in 1960 (hereinafter sometimes called the Estero Act). (Stats. 1960, 1st Ex. Sess., ch. 82.) He appeals from a judgment of dismissal (entered October 31, 1967) which followed the sustaining of general and special demurrers to his second amended petition for mandate. We have concluded that except for the third count of the petition the trial court correctly determined that plaintiff has failed to state a cause of action.

Before discussing the allegations of the petition it is appropriate to clarify the context in which plaintiff has appealed, as the parties disagree as to which of plaintiff's pleadings is the subject of this appeal.

Plaintiff's original petition for mandate alleged that he was suing on behalf of over 100 persons similarly situated, and named as defendants the district and its directors. A complaint in intervention was thereafter filed, with leave of court, by several parties known as the Foster defendants.[1] Plaintiff then filed a first amended petition for writ of mandate, which was followed by a second amended petition. The second amended petition is the only pleading of plaintiff properly before this court and the only defendants are those described above (the district, its directors, and the Foster defendants).

[1]The Foster defendants are T. Jack Foster, his three sons, T. Jack Foster & Sons (a copartnership composed of the individual Fosters), and a corporation whose stock is wholly owned by the individual Fosters.

After plaintiff filed his second amended petition a complaint in intervention was filed by Wayne A. McFadden and the Foster City Community Association on behalf of two thousand residents of Foster City. The association later filed an amended complaint in intervention, to which plaintiff demurred. No ruling on that demurrer appears in the record and there is no justiciable issue, therefore, regarding the first amended complaint in intervention filed on behalf of the Foster City Community Association. The association has not filed a brief on appeal.

Plaintiff filed a cross-complaint couched in ten causes of action, to the association's first complaint in intervention. The cross-complaint designated as defendants not only the district, its directors, and the Foster defendants, but the association, McFadden, a state senator, the district's lawyer, and others as well. The trial court ordered that the cross-complaint be stricken and plaintiff concedes on appeal that he "could not have a petition and a cross-complaint in the same action."[2]

[1] Plaintiff made a motion to amend his second amended petition for writ of mandate so as to substitute the cross-complaint therefor. The trial court denied the motion and plaintiff does not argue in his brief that such denial was erroneous. Nevertheless, he appears to assume that he may treat the cross-complaint as the appropriate pleading before this court on the ground that "it is the final and most complete statement of the issues which petitioner sought to litigate."

There was ample justification for the trial court's refusal to permit the filing of the cross-complaint as an amended petition for writ of mandate. It appears to be plaintiff's seventh attempt to state a cause of action on substantially similar grounds, three complaints and amendments having been filed in the companion case of *Cooper* v. *Leslie Salt Co.* (S.F. 22616), [*]*ante*, p. —— [—— Cal.Rptr. ——, —— P.2d ——], and three petitions and amended petitions in the present action.

We turn to the second amended petition for writ of mandate, which is couched in six causes of action and names the

[2]Plaintiff has also noticed an appeal from a second judgment of dismissal which was entered (on November 27, 1967) with respect to a defendant named only in plaintiff's cross-complaint. In the light of plaintiff's concession, that purported appeal will be dismissed as moot.

[*]Advance Report Citation: *Ante*, p. ——.

district and its directors as defendants and the Fosters as interveners. As stated, the trial court sustained defendants' general and special demurrers, and dismissed the action.

[2] The first cause of action alleges a melange of activities on the part of defendants. Most of the matters have either been discussed in the companion case of *Cooper* v. *Foster, et al.* or do not constitute assertions of wrongful conduct. The only allegations which do not come within these two categories assert that the district purchased land from the Fosters which had no substantial value and is subletting office space at an exorbitant rental in a building owned by the Fosters, and that the district has made a payment to the Fosters' attorney for services allegedly rendered to the Fosters. It is alleged that T. Jack Foster & Sons is a trustee of the district by virtue of its domination of the district's financial affairs, that plaintiff demanded that T. Jack Foster & Sons account to the district for the benefits received from it, and that such demand was refused.

The prayer is that the Foster defendants be compelled to account for the benefits received from the district or, alternatively, that the district "cause an investigation to be made of the disbursements" to the Fosters and report to the court thereon.

It is immediately apparent that mandamus is not a proper vehicle for the asserted grievances. So far as pertinent here, the writ is available only to compel the "performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." (Code Civ. Proc., § 1085.) Plaintiff alleges nothing to indicate that Foster has a duty to account to him, nor is it asserted that the district is enjoined by law to "cause an investigation to be made" of its disbursements to Foster.

Plaintiff apparently views the first cause of action as one for an accounting. Any such action must be predicated upon the theory that plaintiff is suing on behalf of the district. Even if such an action by a taxpayer be considered tenable, the petition does not allege that plaintiff is suing on behalf of the district, nor is it alleged that he made a demand upon the district to request an accounting from the Fosters (see 1 Cal. Jur.2d 426) and that such a demand was refused. In fact plaintiff placed in the record a document executed approximately two weeks after the second amended petition was filed, which indicates that because of criticism by certain persons an

audit would be made of all transactions between the district and Foster, to be paid for by these defendants.[3]

**[3]** The second cause of action alleges that the district paid Hydraulic Dredging Company, not a defendant in this action, a substantial sum of money and that the district's dealings with Hydraulic "were not the result of" public bidding. It is prayed that the district obtain an accounting to show how Hydraulic disbursed the funds and what value it gave for them. Again, the remedy of mandate is inappropriate since the district has no duty to conduct the proposed investigation. There is no allegation of wrongdoing and no grounds are alleged upon which a court may order an accounting.

**[4]** The third cause of action is based upon an asserted violation of section 193 of the Estero Act. The section as amended in 1963 (Stats. 1963, ch. 995) provides that if the board appoints a depositary for its funds it shall also appoint a finance officer, who must be bonded for at least $250,000. The petition alleges that the district has appointed a depositary, that it had an appropriate bond until the end of 1966, but that plaintiff is informed and believes that the district no longer carries a fiduciary bond in compliance with the section. It is also alleged that the district had refused to inform plaintiff of the terms of any bond it might have. Plaintiff prays that the district either make proof that it has a fiduciary bond in compliance with the section or that it place its funds into the hands of some other body which carries such a bond.

The district in its return replied that such a bond existed and attached a copy of a bond for $250,000, insuring "all offices and departments" of the district. It appears on the face of the pleadings, therefore, that the district did not have an individual bond for a finance officer in the amount of $250,000, as required by section 193, but that all of its employees (and the directors) were insured for this sum in the aggregate.[4]

The district argues that the allegations of the third cause of action are insufficient because they do not allege that the dis-

[3]Defendants assert in their brief, and plaintiff has not disputed, that the audit was completed in November 1967 and is a public record of the district.

[4]Plaintiff also asserts that the bond does not guarantee faithful performance, as required by section 1501 of the Government Code, but an examination of the bond shows that it insures against loss occasioned by the failure of the district's employees or directors to faithfully perform their duties.

trict has in fact employed a finance officer or if a finance officer was employed by the district, that he was acting in that capacity while unbonded. Since the allegations state that section 193 requires the district to employ a finance officer in the event it designates a depositary and it is alleged that a depositary has been chosen by the district, they appear to be sufficient as against a general demurrer. No special demurrers were filed by defendants on the ground that the allegations of the third cause of action were uncertain or ambiguous with regard to whether or not the district employed a finance officer.

As the section requires that a finance officer be employed and bonded if a depositary is designated, and such designation is alleged, the relief to which plaintiff would be entitled is to compel the district to secure a faithful performance bond for $250,000 to insure its finance officer, if the district has not already done so. Accordingly, the trial court erred in sustaining the demurrer to the third cause of action.

[5] The allegations of the fourth cause of action appear incomprehensible. It is asserted that certain money was transferred by the district from a park fund to a reclamation fund, that the money in the reclamation fund will be used to make "additional interest payments" on reclamation bonds when they become due, that these future interest payments will exceed the amount in the reclamation fund so that additional monies will be removed from other bond funds for transfer to the recalamtion fund, and that all this is "in violation of law."

It is prayed that the directors be compelled to replace the money transferred from the park fund and to cease transferring money from any fund except for the purposes "lawfullv authorized by the election . . . authorizing the sale of bonds to create the fund."

Although the broad general allegation is made that all these activities are in violation of law, this is merely a conclusion and no facts are alleged which would justify the granting of any relief. The trial court obviously acted properly in sustaining the demurrer to the fourth cause of action.

[6] The fifth cause of action alleges that, according to a bond statement issued by the district, it plans to pay over $2,012,000 for "interest and other expenses" from the proceeds of water or sewer bonds and over $6,000,000 from the proceeds of other bonds to pay interest in the years after

1967. It is also alleged that a resolution of the board states that $2,400,000, or more than 25 percent of the current bond issues, will be used to pay interest on these and prior bonds within the next 12 months and that the election authorizing the issuance of the bonds did not authorize their use for payment of interest on prior outstanding bonds. It is prayed that a judgment be issued directing that none of the bond sale proceeds be used for payment of interest on prior bonds.

It does not appear that the payment of interest from bond proceeds is illegal,[5] or that the law requires that a bond "election" specifically "authorize" the use of proceeds for payment of interest. According to sections 106 and 107 of the Estero Act, the board may call a bond election by a resolution, which may submit to the voters the question of issuing bonds "to make all the outlays or so many of them as may be selected." The fifth cause of action alleges that the board in its resolution stated that more than $2,400,000 of current bond sales would be used to pay interest on bonds, and there is no allegation that the provisions of sections 106 and 107 were not complied with as to the other bond sales mentioned in the fifth cause of action.

[7] The sixth cause of action seeks to compel the district to obtain a welter of financial details and other information from T. Jack Foster & Sons before the district expends any further funds for the "benefit of T. Jack Foster & Sons or their lands."[6] The grounds upon which this relief is sought are that T. Jack Foster & Sons has outstanding debts in large sums, that "it is improper" for the district to spend further public money on Foster lands unless Foster will be able to complete the development of the land, and that "it is doubtful that there will be sufficient value after improvement to yield taxes for repayment of interest and bonds unless capital is invested by T. Jack Foster & Sons."

What has been said above regarding the availability of mandamus to secure the relief sought in the first cause of action is also applicable with regard to the sixth. We can discern no remedy to which plaintiff is entitled under these nebulous allegations.

[5]Section 178 of the act provides that the proceeds of bond moneys may be used for interest and working capital for the period of construction and for 12 months thereafter.

[6]It is also prayed that the district be directed to pay plaintiff's attorneys' fees and costs if the action results in recovery of money for the district.

The judgment entered October 31, 1967, is reversed insofar as it dismisses the third cause of action against defendant district, and the trial court is directed to allow the district reasonable time in which to answer if it be so advised; in all other respects and as to all other defendants that judgment is affirmed.

Plaintiff's purported appeal from the judgment entered November 27, 1967, is dismissed.

Each side is to bear its own costs on appeal.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Mosk, J., and Sullivan, J., concurred.

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[Crim. No. 12753. In Bank. Mar. 21, 1969.]

THE PEOPLE, Plaintiff and Respondent, v. JOHN ANTHONY GREEN, Defendant and Appellant.

[On hearing after decision by the Court of Appeal, Second Appellate District, Division Five, Crim. No. 13925 (265 A.C.A. 1, 71 Cal.Rptr. 100) reversing judgment of the superior court. Judgment reversed.]

[1a-1c] **Criminal Law—Rights of Accused—Confrontation by Witnesses: Evidence at Preliminary Examination—Prior Inconsistent Statements.**—In a nonjury trial for furnishing a narcotic to a minor (Health & Saf. Code, § 11532), the introduction into evidence of prior inconsistent statements of the minor, not restricted to impeachment purposes but to prove the truth of the matters asserted (Evid. Code, § 1235), constituted a denial of defendant's Sixth Amendment right to confrontation, and it was immaterial that he had been cross-examined at the preliminary hearing in which the prior statement had been made, where the trial judge had not presided at that hearing.

[2a, 2b] **Id.—Rights of Accused—Confrontation by Witnesses: Hearsay—Evidence at Former Trial.**—The factor of "neces-

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[1] Extrajudicial statements by witness who is subject to cross-examination as evidence of facts to which they relate, note, 133 A.L.R. 1454. See also, Cal.Jur.2d, Criminal Law, § 139; Evidence, § 382; Am.Jur.2d, Criminal Law, § 343; Evidence, § 500.

**McK. Dig. References:** [1] Criminal, §§ 105, 486.5; [2, 3] Criminal Law, §§ 105, 482; [4, 5] Witnesses, § 118; [6] Criminal Law, § 658(1); [7] Criminal Law, § 153; [8, 9] Criminal Law, § 175(2); [10] Criminal Law, § 485; [11] Criminal Law, § 1382(25).

[S. F. No. 22616. In Bank. Apr. 17, 1969.]

WALTER S. COOPER, Plaintiff and Appellant, v. LESLIE SALT COMPANY et al., Defendants and Respondents.

[S. F. No. 22617. In Bank. Apr. 17, 1969.]

WALTER S. COOPER, Plaintiff and Appellant, v. T. JACK FOSTER et al., Defendants and Respondents.

**[Modification of opinion (70 A.C. 669, —— Cal.Rptr. ——, —— P.2d ——).]**

THE COURT.—The opinion herein, appearing at 70 A.C. 669, is modified by deleting from the sentence which commences on line 12 of page 678 the word "two," and inserting in lieu thereof the figure "22." As so modified such sentence will read as follows: "(c) It is alleged that Innes, a Foster employee and a director of the district, caused the Associated Dredging Company to submit statements to the district pursuant to which [ ] [22] district checks totaling $860,218.05 were issued and delivered to Associated with the understanding that they would be indorsed to respondent Midwest Dredging Corporation, a Foster subsidiary."

[S. F. No. 22619. In Bank. Apr. 17, 1969.]

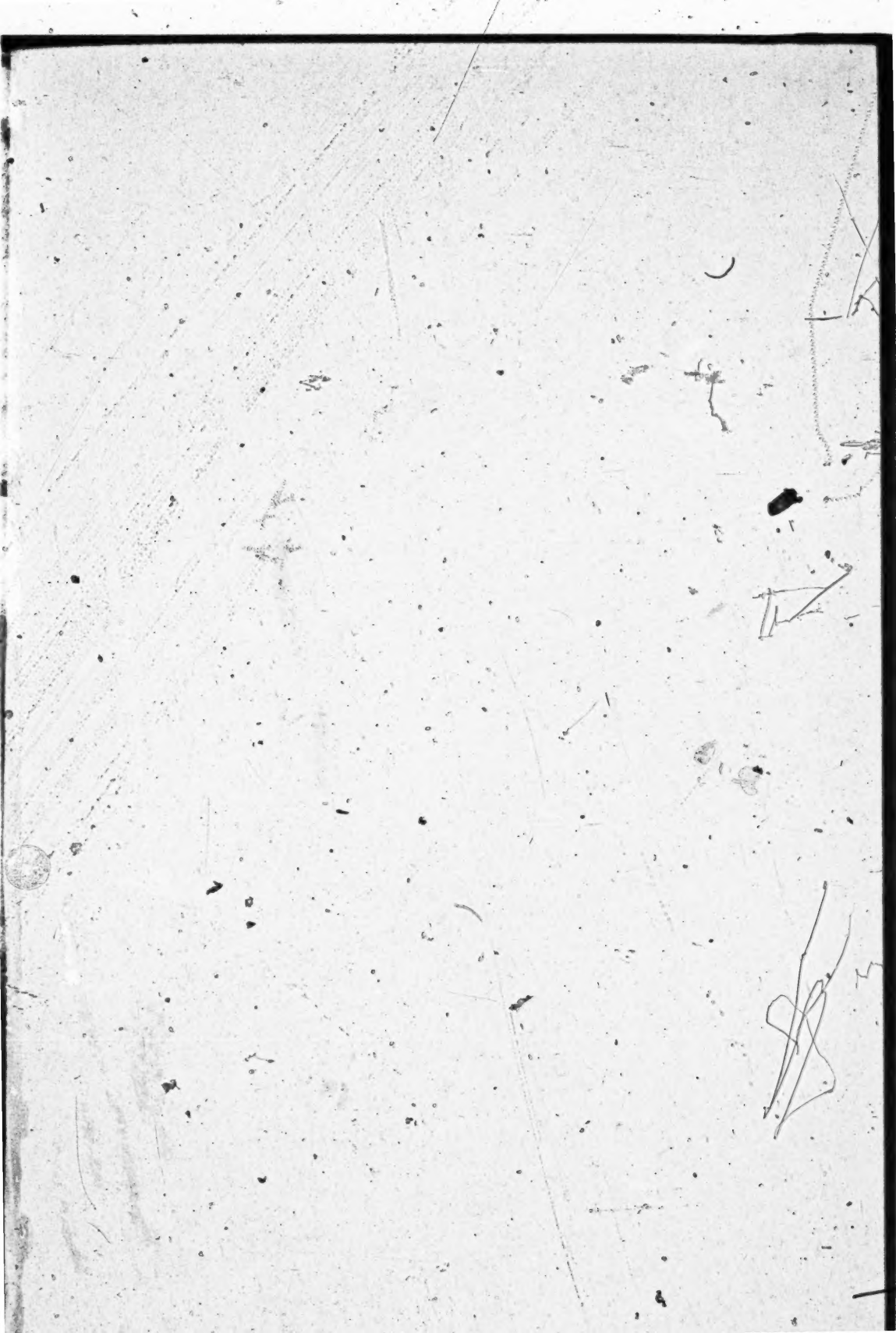
WALTER S. COOPER, Plaintiff and Appellant, v. ESTERO MUNICIPAL IMPROVEMENT DISTRICT et al., Defendants and Respondents; T. JACK FOSTER et al., Interveners and Respondents.

**[Modification* of opinion (70 A.C. 687, —— Cal.Rptr. ——, —— P.2d ——).]**

[1] **Mandamus — Pleading — Amendment.** — In a taxpayer's mandamus proceeding to test the activities of the Estero Municipal Improvement District, its directors, and certain landowner developers of the district, in which petitioner filed a cross-complaint couched in 10 causes of action to a complaint in intervention filed in behalf of 2,000 residents of the district, which cross-complaint designated as defendants the district, its directors, the landowner developers, and others, the trial court properly denied plaintiff petitioner's motion to amend his second amended mandamus petition so as to substitute the cross-complaint therefor, where the latter appeared to be plaintiff's seventh attempt to state a cause of action on substantially similar grounds.

THE COURT.—The opinion herein, appearing at 70 A.C. 687, is modified by deleting from the sentence which commences on line 13 of page 691 the words "the association." As so modified such sentence will read as follows: "The cross-complaint designated as defendants not only the district, its directors, and the Foster defendants, but McFadden, a state senator, the district's lawyer, and others as well."

*This modification requires the substitution of a new headnote No. [1] for the note previously appearing.



*An act to create the Estero Municipal Improvement District and to prescribe its boundaries, organization, powers, operation, management, financing, change of boundaries, and dissolution.* (Stats 1960, ch 82, as amended by Stats 1963, ch 995 and Stats 1965, ch 2043)

[Approved by Governor May 11, 1960. Filed with Secretary of State May 11, 1960.]

*The people of the State of California do enact as follows:*

## Article 1. General Provisions

SECTION 1. The Estero Municipal Improvement District is hereby created to consist of the territory described as follows:

All that certain real property situate in the County of San Mateo, State of California, being a portion of the lands of the Schilling Estate Company, and being more particularly described as follows:

Beginning at a point on the northerly boundary line of lands described in Parcel One of the Deed from Arden Investment Company, a corporation, to Schilling Estate Company, a corporation, dated February 7, 1939, and recorded February 21, 1939 in Book 821 of Official Records of San Mateo County at page 446 (53131-D), from which point the Guano Island Triangulation Station of the United States Coast and Geodetic Survey, marked by a brass tablet, bears N 34°33'30" W 154.78 feet; thence from said point of beginning along said northerly boundary line of Parcel One N 41°09'30" E 355.40 feet; thence

continuing along the northeasterly boundary of said Parcel One S 52°19'30" E 1037.90 feet, and S 54°59'30" E 450 feet to a point thereon; thence leaving said boundary of Parcel One of said Deed, S 35°30'00" W 5584.80 feet; thence at right angles N 54°30'00" W 3794.93 feet to an angle point in the easterly line of lands described in Deed from Schilling Estate Company, a corporation, to Thomas Therkeldsen, also known as Thomas Therkildsen, dated January 26, 1955 and recorded May 24, 1955 in Book 2803 of Official Records of San Mateo County at page 366, said point being described as being "500 feet North of and 200 feet West of the section corner common to Sections 22, 23, 26, and 27" in said Deed; thence leaving the boundary of lands described in said last mentioned Deed, N 0°09'30" W 2086.18 feet to a point on said northerly boundary of Parcel One of the Deed first above described, distant on said boundary S 83°08'00" E 124.10 feet from the westerly terminus of the course described therein as "S 83°08' E 1662.10 feet"; thence along said northerly boundary of Parcel One the following courses: S 83°08'00" E 1538.00 feet, thence tangent to the preceding course on the arc of a curve to the left having a radius of 1582.70 feet and a central angle of 27°08'30" an arc distance of 749.75 feet, thence tangent to the preceding curve N 69°43'30" E 2824.80 feet to the point of beginning, and containing 418.55 acres of land, more or less.

Excepting therefrom that certain parcel described as Exception One to parcel One of the above described Deed from Arden Investment Company to Schilling Estate Company, and containing 18.42 acres of land, more or less.

SEC. 2. This act shall be known and may be cited as Estero Municipal Improvement District Act.

## Article 2. Definitions

SEC. 10. The terms defined in this article have the meaning set forth unless the context requires a different meaning.

SEC. 11. "District" means the Estero Municipal Improvement District.

SEC. 12. "Board" means the board of directors of the district.

SEC. 13. "President" and "secretary" mean the president and secretary, respectively, of the district.

SEC. 14. "County" means the County of San Mateo.

SEC. 15. "Board of supervisors" means the board of supervisors of the county.

SEC. 16. "Charges" includes fees, tolls, rates and rentals.

SEC. 17. "Land" means land in the district and does not include improvements or personal or utility property.

SEC. 18. "Legal representative" means an officer or other person or persons appointed to serve as such by the board of directors of a corporation owner.

SEC. 19. "Owner" means the owner of land as shown on the last equalized county assessment roll.

SEC. 20. "Voter" means an owner, or the officer appointed therefor by the board of directors of a corporation owner, or the legal representative of the owner.

SEC. 21. "Officers of election" consist of an inspector and two judges. They shall be persons appointed by the board of directors and need not be voters.

SEC. 22. In the application to the district of laws, the procedure of which is made applicable to proceedings of the district, terms used in those laws shall have the following meanings:

(a) "City council," "council" and "legislative body" mean board.

(b) "City," "municipality" and "local agency" mean district.

(c) "Clerk" and "city clerk" mean the secretary of the district.

(d) "Superintendent of streets," "street superintendent" and "city engineer" mean the engineer of the district or other person appointed to perform such duties, to be called district engineer.

(e) "Tax collector" means the tax collector of the district.

(f) "Treasurer" and "city treasurer" mean the county treasurer or district finance officer.

(g) "Auditor" means the county controller or district finance officer.

(h) "Budget Law" means Chapter 1 (commencing at Section 29000) of Division 3 of Title 3 of the Government Code.

SEC. 23. In the application of any law to this district, said law shall be as then amended.

## Article 3. General Administrative Provisions

SEC. 26. The board is the governing body of the district and shall consist of three (3) members, one of whom shall be president. The officers of the district are the three members of the board and a secretary. The district may have a finance officer, and other officers as the board may from time to time create. An owner may nominate an officer or a legal representative for each office to be filled by election or appointment.

SEC. 27. The first district board shall be elected at an election conducted by the board of supervisors immediately following the formation of the district. The first district board shall classify itself by lot so that one director will hold office for two years and two directors will hold office for four years following the district formation or until their successors have been elected or appointed and qualified.

SEC. 28. Two directors shall be owners, or officers or legal representatives of owners and shall be nominated and elected or appointed in accordance with Article 4. Commencing in the year 1964 and each four years thereafter one of the expiring terms of director shall be filled by a public member designated and appointed by the county board of supervisors.

SEC. 29. The term of each director, after the first board, shall be four years, or until the election or appointment, and qualification of his successor.

SEC. 30. All vacancies occurring in the office of director shall be filled by appointment by the remaining directors.

SEC. 31. An appointment to fill a vacancy in the office of director shall be for the unexpired term of the office in which the vacancy exists, and until the election or appointment of his successor.

SEC. 32. Once each year, the board shall elect one of its members to serve as president, shall appoint a secretary and shall fill any other offices as it may from time to time create.

SEC. 33. The president shall be a member of the board and the secretary and other officers and employees may be members of the board.

SEC. 34. The board shall act only by ordinance, resolution, motion or contract.

SEC. 35. A majority of the board shall constitute a quorum for the transaction of business.

SEC. 36. No ordinance, resolution, motion or contract shall be passed or become effective without the affirmative vote of at least the majority of the members of the board.

SEC. 37. Except where action is taken by the unanimous vote of all members present and voting, the ayes and noes shall be taken upon the passage of all ordinances, resolutions, motions or contracts and entered upon the minutes of the board.

SEC. 38. The enacting clause of all ordinances passed by the board shall be "Be it ordained by the Board of Directors of the Estero Municipal Improvement District, as follows:".

SEC. 39. All ordinances shall be signed by the president and attested by the secretary.

SEC. 40. All legislative sessions of the board shall be public.

SEC. 41. The board, by ordinance, shall provide for the time and place of holding its regular meetings, the manner of calling special meetings, and shall establish rules for its proceedings.

SEC. 42. Each officer shall receive such compensation as the board shall, by ordinance, establish; provided, however, that compensation of each director for attendance at meetings shall not exceed twenty-five dollars ($25) for each meeting of the board attended by him, not exceeding three (3) meetings in any calendar month.

SEC. 43. All contracts, deeds, warrants, releases, receipts and documents shall be signed in the name of the district by the president and countersigned by the secretary.

SEC. 44. If allowed by the board a director may receive traveling and other expenses incurred by him when acting for the board, and compensation for any other services rendered by him for the district.

SEC. 45. The finance officer shall serve at the pleasure of the board. He and the secretary shall receive such compensation as the board shall determine.

SEC. 46. The county treasurer, county controller, and county tax collector shall be ex officio officers of the district.

SEC. 47. All county officers shall be liable under their several official bonds for the faithful discharge of the duties imposed upon them by this act.

SEC. 48. In addition to the duties prescribed herein the officers of the district shall have such duties as are prescribed by the board.

## Article 4. Elections

SEC. 55. A general district election shall be held on the fourth Tuesday in March in every other year commencing with the second year following the formation of the district.

SEC. 56. A special election may be called by the board to be held at any time.

SEC. 57. The hours during which the polls shall be opened at any general or special district election shall be as established by the board.

SEC. 58. Notices of elections shall be given as nearly as practicable in accordance with the general laws regarding notices of municipal elections.

SEC. 59. Nominations for the position of director shall be in writing, shall be signed by voters representing at least 10 percent of the assessed valuation of land in the district as shown by the last equalized assessment roll, shall be filed, for the first election following the formation of the district, with the county clerk, and, for all subsequent elections, with the secretary of the district, not more than 45 nor less than 25 days before the election.

SEC. 60. No voter shall sign any more nominations than there are offices to be filled.

SEC. 61. If on the 24th day prior to a general district election only one person has been nominated for each of the positions to be filled at that election, or no person has

been nominated for any such office, or offices, an election shall not be held.

SEC. 62. In such case the notice of election shall, instead of calling an election, state that no election is to be held but that the board of supervisors shall appoint those nominated for positions of directors, or, if no person has been nominated, the board of supervisors shall appoint any qualified person to the position.

SEC. 63. If, pursuant to Section 62, a general district election is not held, the board of supervisors of the County of San Mateo, at a meeting held prior to the day fixed for the election, shall appoint to the positions of directors those persons nominated, or, if no persons are nominated, any qualified persons, who shall qualify and serve as if elected at a general district election.

SEC. 64. Each voter shall have one vote for each one dollar ($1) in assessed valuation of land owned by him as shown by the last equalized assessment roll.

SEC. 65. A majority of the votes cast shall be required to elect a director or approve a proposition.

SEC. 66. Following the close of the polls the officers of election shall canvass the ballots. The ballots and returns shall be sealed and delivered to the secretary or president.

SEC. 67. The board shall meet and canvass the returns and enter the returns on its minutes. The entry shall be conclusive evidence of the fact and regularity of all prior proceedings and of the facts stated in the entry.

SEC. 68. Except as provided in this act the election shall be conducted as nearly as practicable in accordance with the general laws for cities.

## Article 5. Powers

SEC. 75. The district may use a seal, alterable at the pleasure of the board.

SEC. 76. The district may sue and be sued by its name.

SEC. 77. The district may acquire, construct, reconstruct, alter, enlarge, lay, renew, replace, maintain and operate, street and highway lighting facilities; facilities for the collection, treatment and disposal of sewage, industrial wastes, storm waters, garbage and refuse; the production, storage, treatment and distribution of water for public and private purposes; parks, playgrounds and works to provide for the drainage of roads, streets and public places, including, but not limited to curbs, gutters, sidewalks and grading and pavement; and the reclamation of submerged or other land by watering or dewatering.

SEC. 78. The district may acquire or construct the reclamation of land for private small craft harbor purposes, by grading, excavation and fill, and acquire or construct therein or in connection therewith breakwaters, levees, jetties, bulkheads, walls of rock or other materials, wharves, piers, docks, slips, quays, moles, launching facilities, and roadways, walkways, parking places, drainage facilities, sewer, water, lighting, garbage and refuse disposal, and all works or utilities incidental to or necessary or useful in the operation of such harbor; and finance the costs thereof through an improvement district of the area of said facilities.

SEC. 79. The district may acquire, construct, maintain and operate facilities for providing fire protection to the district and its occupants or inhabitants, including build-

ings, engines, hose, hose carts, or carriages, and other appliances and supplies for the full equipment of fire companies or departments and a police department, to protect and safeguard life and property.

SEC. 79a. The district may acquire or construct conduits and other underground gas, telephone and electrical facilities required under any rules and regulations adopted by any public utility pursuant to the rules, regulations and orders of the Public Utilities Commission, and may sell such facilities in the manner provided by Article 9 (commencing at Section 50550), Chapter 2, Part 1, Division 1, Title 5 of the Government Code; and bridges, culverts, underpasses and viaducts.

SEC. 80. The district may take, acquire, hold, use, lease and dispose of property of every kind within or without the district, necessary, expedient or advantageous to the full exercise and economic enjoyment of its purposes and powers.

SEC. 81. The district may exercise the right of eminent domain for the condemnation of private property for public use within but not without the district. The board has the same rights and powers with respect to the taking of property for the public uses of the district as are now or may hereafter be conferred by general law on the legislative body of a city. The provisions of Title 7 (commencing at Section 1237) of Part 3 of the Code of Civil Procedure shall apply.

SEC. 82. Notwithstanding the provisions of Sections 80 and 81 of this act, the district shall not acquire property located outside the district boundaries without first ob-

taining the consent of the board of supervisors of the county in which the property to be acquired is located.

SEC. 83. The district may make and accept contracts, deeds, releases and documents that, in the judgment of the board, are necessary or proper in the exercise of any of the powers of the district.

SEC. 84. The district may co-operate and contract with the federal government of the United States and with the State of California, or with any county, municipal corporation, district, or other public corporation, or with any person, firm or corporation, for the joint acquisition, construction, or use or aid in the construction of any facilities which the district has the power to acquire or construct under this act or for the providing of any service within the powers of the district.

SEC. 85. The district may borrow money and provide for its repayment in the manner provided in Article 7 (commencing at Section 53820) of Chapter 4 of Part 1 of Division 2 of Title 5 of the Government Code.

SEC. 86. The district may guarantee the performance of any of its transactions.

SEC. 87. The district may incur bonded indebtedness and issue bonds in the manner herein provided.

SEC. 88. Bonds issued by the district shall be of the form and executed in the manner provided by the board.

SEC. 89. If any officer whose signature or countersignature appears on bonds or coupons ceases to be such officer before delivery of the bonds, his signature shall be as effective as if he had remained in office.

SEC. 90. Any bonds issued by the district organized under the provisions of this act are given the same force, value and use as bonds issued by any municipality and shall be exempt from all taxation within the State.

SEC. 91. The district may refund or retire any public indebtedness or lien that may exist or be created against the district or any property therein which shall have arisen out of the transaction of the affairs of the district.

SEC. 92. The district may issue warrants on any moneys with the county treasurer in payment of district obligations. The warrants shall be registerable as provided for county warrants when not paid for want of funds. Demands allowed by the board shall be prepared, presented, and audited in the same manner as demands upon the funds of the county, but free of the limitation of any budget law.

SEC. 93. The district may cause special assessments to be levied and collected and issue bonds to represent unpaid assessments on the basis of benefit to the properties assessed for the purpose of financing the acquisition and construction of public improvements.

SEC. 94. The district may appoint, employ and fix the compensation of engineers, attorneys, assistants and other employees as it deems proper.

SEC. 95. The district may sell any effluent or other product resulting from the operation of any treatment or disposal plant or facility constructed or acquired by or for the district.

SEC. 96. The district may take out insurance in the form and in the amounts as the board may deem neces-

sary for the adequate protection of the district's property, officers, employees and interests.

SEC. 97. The district may make and enforce all necessary and proper regulations, not in conflict with the laws of this State, for the removal of garbage and refuse and the supplying of sewage, light, water, storm water and fire and police protection service. A violation of a regulation of the district is a misdemeanor punishable as such. A regulation of the board shall be adopted by ordinance and shall be posted for one week in three public places in the district and shall take effect upon expiration of the week of such posting. A subsequent finding of the board, entered in its minutes, that posting has been made is conclusive evidence that the posting has been properly made.

SEC. 98. The district may compel all residents and property owners in the district to connect their houses, habitations and structures requiring sewage or drainage disposal service with the sewer and storm drains of the district, and to use district garbage and refuse removal service and facilities.

SEC. 99. The district may prescribe, revise and collect charges for services and facilities furnished by it, for the regulation thereof and for revenue. Charges may be collected either singly or collectively, and the board may establish rules governing their levy and collection.

### Article 6. General Obligation Bonds

SEC. 105. The district may issue bonds as provided in this article for any of the purposes stated in Sections 77, 78, 79 and 80.

SEC. 106. By resolution, when in its judgment it is advisable, the board may call an election and submit to the voters of the district the question of whether bonds shall be issued.

SEC. 107. The resolution calling the election may submit as one proposal the question of issuing bonds to make all the outlays or so many of them as may be selected, or the resolution may submit at the election as separate questions the issuance of bonds for any of the outlays singly or in combination.

SEC. 108. Notices of bond elections shall be given as nearly as practicable in accordance with the general laws regarding notices of municipal elections.

SEC. 109. The vote shall be by ballot, without reference to the general law in regard to the form of ballot.

The ballot shall contain the words "Bonds—Yes" and "Bonds—No," and the person voting at the election shall put a cross (+) upon his ballot after the "Yes" or "No" to indicate whether he has voted for or against the bonds.

SEC. 110. Following the close of the polls the officers of election shall canvass the ballots. The ballots and returns shall be sealed and delivered to the secretary or president. The board shall meet and canvass the returns and enter the returns in its minutes.

The entry is conclusive evidence of the fact and regularity of all prior proceedings, and of the facts stated in the entry. No informality shall affect the validity of said bonds.

SEC. 111. Except as herein provided, the election shall be conducted as nearly as practicable in accordance with the general laws for cities.

SEC. 112. If, at the election, two-thirds of the votes cast are in favor of the issuance of bonds, the board may issue and dispose of the bonds.

SEC. 113. Bonds issued by the district under the provisions of this article shall be of such denomination as the board determines except that no bonds shall be of a denomination less than one hundred dollars ($100) or greater than one thousand dollars ($1,000).

SEC. 114. The bonds shall be payable in lawful money of the United States at the office of the treasurer or at such other place, depositary, paying agent or fiscal agent within or without the State of California as may be designated by the board, and bear interest at a rate not exceeding six percent (6%) per annum, payable semi-annually in like lawful money, except the first year which may be for more or less than one year.

SEC. 115. No bonds shall be payable in installments, but each shall be payable in full on the date specified therein by the board. The board may provide that all bonds issued by the district may be subject to retirement at any time prior to maturity, in which event they shall so state on their face.

SEC. 116. Each bond shall be signed by the president and countersigned by the secretary. The signature of the president on the bonds and of the secretary on the coupons may be printed, lithographed or engraved and such shall constitute due execution.

SEC. 117. The bonds shall be numbered consecutively, beginning with number one, and shall have coupons attached referring to the number of the bond.

SEC. 118. Before selling the bonds, or any part thereof, the legislative body shall give notice inviting sealed bids in such manner as the legislative body may prescribe. If satisfactory bids are received, the bonds offered for sale shall be awarded to the highest responsible bidder. If no bids are received, or if the legislative body determines that the bids received are not satisfactory as to price or responsibility of the bidders, the legislative body may reject all bids received, if any, and either readvertise or sell the bonds at private sale.

SEC. 119. The term of bonds issued shall not exceed forty (40) years.

SEC. 120. The resolution providing for the issuance of the bonds, by its adoption, shall be conclusive evidence of the regularity of said bond proceedings.

SEC. 121. The board may, in its discretion, before or after issuance, commence in the superior court of the county, a special proceeding to determine its right to issue the bonds and their validity, similar to the proceedings in relation to irrigation bonds, provided for by the Irrigation District Law, Division 11 (commencing at Section 20500) of the Water Code, and all supplementary acts, and all their provisions apply to and govern the proceedings to be commenced by the board, so far as applicable. The judgment has the same effect as a judgment in relation to irrigation bonds under the provisions of that law. The board may use the same procedure to

validate the creation of the district and any annexations thereto.

SEC. 122. An issue of bonds is the aggregate principal amount of all bonds authorized to be issued in accordance with a proposal submitted to and approved by the voters of the district, but no indebtedness will be deemed to have been contracted until bonds shall have been sold and delivered and then only to the extent of the principal amount of bonds sold and delivered.

SEC. 123. The board may, in its discretion, divide the aggregate principal amount of an issue into two or more divisions or series and fix different dates for the bonds of each separate division or series. In the event any authorized issue is divided into two or more divisions or series, the bonds of each division or series may be made payable at the time or times as may be fixed by the board separate and distinct from the time or times of payment of bonds of any other division or series of the same issue.

## Article 7. Improvement District Bonds

SEC. 130. Bonds of a portion of the district may be authorized and proceedings therefor shall be had in the manner now or hereafter provided for the issuance of bonds for a portion of a county water district.

## Article 8. Revenue Bonds

SEC. 135. The district may create revenue bond indebtedness for the acquisition and construction, or acquisition or construction of any improvements or property or facilities contained within its powers.

SEC. 136. Proceedings for the authorization, issuance, sale, security, and payment of revenue bonds shall be had, the board shall have the powers and duties, and the bondholders shall have the rights and remedies, all in substantial accordance with and with like legal effect as provided in the Revenue Bond Law of 1941, Chapter 6 (commencing at Section 54300) of Part 1 of Division 2 of Title 5 of the Government Code; provided, however, that qualified voters at the election therein provided shall be voters as defined in this act, and the method of voting shall be as herein provided. As used therein the word "resolution" shall mean ordinance, the words "local agency" shall mean district, and the words "legislative body" shall mean board.

## Article 9. Assessment Bonds

SEC. 150. The Municipal Improvement Act of 1913, Division 12 (commencing at Section 10000) of the Streets and Highways Code, the Improvement Act of 1911, Division 7 (commencing at Section 5000) of the Streets and Highways Code, the Street Opening Act of 1903, Part 1 (commencing at Section 4000) of Division 6 of the Streets and Highways Code, and the Improvement Bond Act of 1915, Division 10 (commencing at Section 8500) of the Streets and Highways Code, as now or hereafter provided, are applicable to the district.

SEC. 151. The provisions of any act to the contrary, it shall not be necessary to obtain the consent of the county to conduct assessment proceedings. No assessment or bond hereafter levied or issued shall become a lien and no person shall be deemed to have notice thereof until a

certified copy of the assessment and the diagram attached thereto shall be recorded in the office of the district engineer and in the office of the county engineer of the county.

## Article 10. Taxation—County Roll

SEC. 160. The lien for taxes for the first fiscal year after the district is formed shall attach on the first Monday in March or on the date the district is created, whichever is later. It shall not be necessary to make or file a notice of the creation of this district.

SEC. 161. Annually, at least fifteen (15) days before the first day of the month in which the board of supervisors is required by law to levy the amount of taxes required by law for county purposes, the board shall furnish to the board of supervisors a written statement of the following:

1. The amount necessary to pay the interest on bonds for that year, and the portion of the principal that is to become due before the time for making the next general tax levy.

2. The amount necessary to maintain, operate, extend, or repair any work or improvements of the district, and to defray all other expenses incidental to the exercise of any of the district powers or to pay any existing obligations of the district.

SEC. 162. The board of supervisors shall at the time and in the manner of levying other county taxes, levy and cause to be collected a tax upon the taxable real and personal property in the district, based upon the last

equalized assessment roll of the county, sufficient to pay the amounts set forth in the statement of the board. The aggregate taxes levied for any one fiscal year, other than those levied to pay the principal and interest on bonds, shall not exceed five dollars ($5) on each one hundred dollars ($100) of the assessed valuation of taxable real and personal property in the district.

SEC. 163. If the board fails to furnish the written statement, the board of supervisors shall ascertain the amount necessary to pay the interest on the bonds for that year and the portion of the principal that is to become due before the proceeds of the next general tax levy shall become available, and shall levy and cause to be collected the amount.

SEC. 164. The tax shall be collected at the same time and in the same manner as the general tax levy for county purposes, and when collected, shall be paid into the county treasury to the credit of the proper district fund, as provided in Article 12. The board shall control and order its expenditure.

SEC. 165. The principal and interest on district bonds shall be paid by the treasurer, if payable at his office, in the manner now or hereafter provided by law for the payment of principal and interest on the bonds of the county, unless said bonds shall be made payable elsewhere.

SEC. 166. Compensation to the county for the performance of services described in this article shall be fixed by the parties.

## Article 11. Alternative Tax Procedure

SEC. 170. The alternative procedure of the County Water District Law for the levy and collection of district taxes shall apply.

## Article 12. Funds

SEC. 175. In a fund called the "Estero Municipal Improvement District General Fund," the treasurer shall place and keep the money levied by the board for that fund.

SEC. 176. The proceeds of the sale of revenue bonds or general obligation bonds or proceeds of special assessments levied by the board shall be deposited with the treasurer and shall be placed in a fund to be called the "Estero Municipal Improvement District Construction Fund No. ....." (inserting number).

SEC. 177. The money in any construction fund shall be used for the purpose indicated in the resolution calling the election upon the question of the issuance of bonds, or for the purpose described in the resolution of intention in the assessment proceedings, or for repayment of money borrowed for the purpose of financing the improvement for which bonds were subsequently issued or the assessment levied.

SEC. 178. The bond moneys may also be used for interest and working capital for the period of construction and for twelve (12) months thereafter, and also to pay the costs of their authorization and issuance including fees for legal, engineering, fiscal, economic or other service.

SEC. 179. Any money in the construction fund determined by resolution of the board to be in excess of the amounts required for completion of the improvement authorized may, by the resolution so determining, be transferred to any other fund of the district and be used for any lawful purpose.

SEC. 180. In a fund called the "Estero Municipal Improvement District Bond Fund, _____" (inserting series number), the treasurer shall keep money levied or collected for that fund.

SEC. 181. No part of the money belonging in the bond fund may be transferred to any other fund or be used for any purpose other than the payment of principal and interest of the bonds of the district, or for repayment of money borrowed for the purpose of paying the principal and interest of the bonds of the district, until said bonds are fully paid, at which time it may be transferred to any other fund.

SEC. 182. The budget law shall not apply to the district.

## Article 13. Alternative Depositary of District Money

SEC. 190. The provisions of this article are alternative or supplemental to those providing for the use of the county treasury.

SEC. 191. The board may by resolution designate a bank as depositary of any or all of its funds. No question of interest shall affect such appointment. If the depositary is not designated for all of its funds, it shall designate what funds are to be deposited with the depositary. The

county treasurer shall be the depositary for all funds not so designated.

SEC. 192. The charges of any depositary selected shall be a proper expense of the district.

SEC. 193. If the board appoints a depositary, it shall appoint a person who shall be known as finance officer, who shall serve at its pleasure. It shall fix the amount of his compensation. It shall fix the amount of and approve his bond which in no event may be less than two hundred fifty thousand dollars ($250,000).

SEC. 194. Bond principal and interest and salaries shall be paid when due. All other claims and demands shall be approved in writing or in open meeting by a majority of the members of the board.

SEC. 195. Warrants shall be drawn by the finance officer and signed by the president and secretary, or one of them and one member of the board.

SEC. 196. The finance officer shall install and maintain a system of auditing and accounting that shall completely and at all times show the financial condition of the district.

SEC. 197. The finance officer shall make annual or earlier written reports to the board, as it shall determine, as to the receipts and disbursements and balances in the several accounts under his control. The report shall be signed by him and filed with the secretary.

## Article 14. Changes in Organization

SEC. 205. Territory may be annexed to or detached from the district, if such territory would qualify for an-

nexation to or detachment from a county water district, and other changes of organization or reorganizations may be made, all in the manner and as provided in Division 1 (commencing at Section 56000) of Title 6, Government Code.

SEC. 206. Territory may be excluded from the district in the manner now or hereafter provided for the exclusion of territory from a county water district. Land and improvements shall mean land.

SEC. 207. Whenever any portion of the district is included within a city by annexation to the city such portion may be withdrawn from the district. The legislative body of the city may provide, by resolution, that such territory shall be withdrawn from the district. Such withdrawal shall be effective on the date fixed by the legislative body of the city. Where the withdrawal is effective on or before February 1st of the fiscal year the district shall furnish district services to the territory until the first day of July next succeeding. Where the withdrawal is effective subsequent to February 1st of the fiscal year and where the territory is subject to district taxation and assessment the district shall furnish district services to the territory until the thirtieth day of June of the fiscal year next succeeding.

SEC. 208. Whenever any portion of the district is included within a city by reason of incorporation of the city, such portion may be withdrawn from the district. Such withdrawal shall be effective upon the filing with the State Board of Equalization, the governing body of the district, the county clerk or registrar of voters, and the county assessor, of copies of a resolution of the legis-

lative body of the city, describing the included portion, and declaring such portion withdrawn.

SEC. 209. Upon the withdrawal of any territory of the district pursuant to Section 207 or 208:

(a) If the assessed value of the real property within the area withdrawn represents one-half of 1 percent, or less, of the total assessed value of the real property within the district prior to the withdrawal, as determined from the last equalized assessment roll of the property within the district, all of the property and assets of the district shall be retained by the district.

(b) If the assessed value of the real property in the area withdrawn exceeds the amount prescribed by subdivision (a), the city and the district shall have six months from the effective date of the withdrawal in which, after giving consideration to all factors involved, including population, assessed valuation, the effect of the annexation or change of boundaries on the remaining portion of the district, the length of time the portion being withdrawn has paid taxes and the total amount of such taxes paid, and such other matters as should be considered in arriving at an equitable distribution, they may establish a mutually agreeable basis for the distribution of the property and assets of the district between the city and the remaining district. If, within such period a mutually agreeable basis is reached, the property and assets of the district shall be distributed between the city and the remaining district upon such basis.

(c) If, under the provisions of subdivision (b), no mutually agreeable basis for the distribution of the property and assets of the district is reached within the six-

month period, on the date the district ceases to furnish district services to the area withdrawn or upon the end of the six-month period, whichever is the last to occur, all of the property and unencumbered funds of the district shall be divided between the city and the remaining district in proportion to the average assessed value of the real property within the area withdrawn to the average assessed value of the real property within the entire district during the five-year period prior to the effective date of the withdrawal, as determined from the equalized assessment rolls for such period.

All funds and property received by the city shall be used exclusively and directly for the types of services furnished by the district; provided, that nothing herein shall prevent the sale of property not needed for such purposes for its fair market value if the funds derived from such sale are used solely for such purposes.

For the purpose of this section, the unencumbered funds are the sum of money, uncollected taxes, and other uncollected amounts in excess of an amount sufficient to pay all claims and accounts against the district, but shall not include funds necessary for the maintenance and operation of the district for any period for which the district has the duty to provide district services within the area withdrawn.

SEC. 210. Property in territory withdrawn or detached from the district shall continue to be subject to tax, levied as provided in Section 162, to pay the principal of and interest on bonds issued for the account of the district and outstanding at the time of such withdrawal or detachment.

SEC. 211. (a) When land, upon which there are structural improvements owned, being acquired or leased by the district, is withdrawn from the district and included in a city by incorporation, annexation or otherwise, the city shall, if it succeeds to the rights of the district in such structural improvements, as a part of the division of property provided for in Section 209, assume the outstanding liability of the district in connection with the acquisition or leasing of such improvements.

(b) In every case where land, upon which there is a structural improvement owned, being acquired or leased by the district, is proposed to be annexed to a city, the clerk of such city shall cause written notice of such proposed annexation to be mailed to the governing body of the district. Such notice shall be sent not less than 10 days before the first public hearing upon such proposed annexation.

SEC. 212. The district may be dissolved in the manner now or hereafter provided for the dissolution of county water districts, excepting Sections 32851.5 and 32858 of the Water Code and excepting that title to any property and moneys shall vest in the land owners of the district in the proportion that the assessed valuation of the land of each bears to the total assessed valuation of all land in the district that is on the county assessment roll at the time of such dissolution. Land and improvements shall mean land. Electors shall mean voters herein.

## Article 15. Need for Special Act

SEC. 215. The purpose of this act is to form the Estero Municipal Improvement District in order that the area

benefited may be provided with various municipal improvements. Special facts and circumstances, applicable to the general area within which the district lies and not generally, make the accomplishment of this purpose impossible under existing general laws and therefore special legislation is necessary. The special facts are as follows:

(a) The area has no facilities for the treatment and disposal of sewage and, in its development, will consequently contaminate the waters of the State.

(b) The area is without an adequate water supply, storage and distribution system for public and private purposes.

(c) There is need for small craft harbor facilities in the area and the public interest, economy and general welfare will be served by privately owned facilities of such nature being expedited, and such action will conserve moneys made available by the State for public small craft harbors.

(d) There is urgent need for the improvements which the district is empowered to construct under this act; but other municipal powers which could be exercised by a city are not required, and would result in more government than the area needs or wants.

(e) There are no existing general laws under which the area could be provided with the facilities it needs short of incorporation as a city. Therefore, the only way in which the particular needs of the area can be provided is by special act.

(f) The land in the district is not owned by residents. The owners are the ones primarily concerned with the

district and the ones who will be supporting the district. The owners should therefore hold the voting power. Since no general law district with the necessary powers provides for voting by owners, special legislation is necessary.

(g) The area is of strategic importance during times of war or threatened war. It is strategically located adjacent to the Bayshore industrial complex. Influx of military men and their families during times of war or threatened war greatly increases the necessity of providing municipal facilities.